

Code of Conduct Guidelines and Procedures

PRO-015

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1. Title

National Museum of Australia Code of Conduct Guidelines and Procedures ('Guidelines').

PART A - GENERAL

2. Introduction

The National Museum of Australia (the Museum) is a major cultural institution charged with researching, collecting, preserving and exhibiting historical material of the Australian nation. The Museum focuses on the three interrelated areas of Aboriginal and Torres Strait Islander history and culture, Australia's history and society since European settlement in 1788 and the interaction of people with the environment.

Established in 1980, the Museum is a publicly funded institution governed as a statutory authority in the Commonwealth Arts portfolio. The Museum's building on Acton Peninsula, Canberra opened in March 2001.

3. Scope

These Guidelines should be referred to in relation to Code of Conduct investigations regarding any employees of the Museum, including both non-ongoing and ongoing employees. These Guidelines may also be referred to in relation to former employees of the Museum, where that employee is suspected of breaching the Code of Conduct, and employees who knowingly provide false or misleading information in connection with their engagement as an employee of the Museum.

3.1 Purpose

The purpose of this document is to:

- outline the APS Code of Conduct, the APS Values and the APS Employment Principles and how they apply to Museum employees, former employees and statutory office holders in particular circumstances
- provide an overview of the roles and responsibilities of staff and other stakeholders in relation to the Code of Conduct, APS Values and APS Employment Principles
- provide guidance for reporting suspected breaches of the Code of Conduct
- provide guidance about whether a formal or informal process should be initiated
- provide guidance for decision-makers when determining whether an APS employee, or former APS employee, in the Museum has breached the Code of Conduct (see Part C)
- provide guidance for decision-makers when determining the sanction (if any) to be imposed on an employee in the Museum who is found to have breached the Code of Conduct (see Part D)
- outline record keeping requirements relating to suspected breaches of the Code of Conduct and related matters
- provide an overview of review of actions.

3.2 Definitions

In these Guidelines, unless the contrary intention appears,

- 1) **'decision-maker'** means:
 - a. in relation to decisions referred to in these Guidelines (including decisions referred to in Attachment A – Code of Conduct Procedures) – the Director or a person who has been appointed, delegated or authorised to undertake that role in accordance with these Guidelines;
 - b. in relation to decisions made under the *Public Service Act 1999*, the Public Service Regulations 1999, the *Australian Public Service Commissioner's Directions 2016* or any other Act or legislative instrument – the Director or a person to whom the power to make a particular decision has been delegated by the Director.
- 2) **'Director'** means the Director of the Museum or his or her delegate.

3.3 Delegation

The Director may delegate all or any of his or her powers under these Guidelines and Procedures to a member of staff of the Museum.

4. Commencement date

The guidelines and procedures contained in this document apply from 1 December 2016.

5. Introduction

The APS Code of Conduct requires APS employees at all times to behave in a way that upholds the APS Values, the APS Employment Principles and the integrity and good reputation of the agency and the APS. All employees of the Museum must comply with the APS Code of Conduct, the APS Values, the APS Employment Principles, all applicable laws and any other requirements prescribed by the *Public Service Regulations 1999* or the *Australian Public Service Commissioner's Directions 2016*.

Employees should be aware that certain requirements in the APS Code of Conduct apply "at all times" and other requirements apply "in connection with" an employee's APS employment, and accordingly such requirements can extend to behaviour outside of the workplace.

6. The APS Code of Conduct

Section 13 of the *Public Service Act 1999* sets out the APS Code of Conduct:

- 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 the *Public Service Act 1999*), 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.
- 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.

7. The APS Values

Section 10 of the *Public Service Act 1999* sets out the following APS Values:

Impartial: The APS is apolitical and provides the Government with advice that is frank, honest, timely and based on the best available evidence.

Committed to service: The APS is professional, objective, innovative and efficient, and works collaboratively to achieve the best results for the Australian community and the Government.

Accountable: The APS is open and accountable to the Australian community under the law and within the framework of Ministerial responsibility.

Respectful: The APS respects all people, including their rights and their heritage.

Ethical: The APS demonstrates leadership, is trustworthy, and acts with integrity, in all that it does.

Further details and examples of behaviour and standards of conduct under the APS Values are contained in the *Australian Public Service Commissioner's Directions 2016*.

7.1 The importance of the APS Values

The APS aspires to be among the best in the world – a Service that is recognised and valued because its people:

- take the extra steps necessary to ensure that the needs of the Australian community are identified and met;
- are forward looking and innovative;
- work together and with the community to meet community needs; and
- deliver effective programs and excellent service with maximum efficiency, and so provide great value for money.

Fundamental to the achievement of these goals is the set of attitudes and behaviours that APS employees bring to their work. The APS Values, together with the APS Employment Principles, define the APS as an institution, and guide it in its dealings with everyone and in everything it does. Behaviour consistent with the APS Values strengthens public trust and confidence in public administration, and provides a secure foundation to guide the APS into the future.

7.2 The application of the APS Values

The APS Values and the APS Commissioner's Directions set out standards and outcomes that are required of APS employees, taking account of an individual's duties and responsibilities.

Each of the APS Values is of equal importance. There is no hierarchy of Values. There may be particular situations where there is tension between the different APS Values that are to be applied. In such cases, good judgement will need to be exercised to find the appropriate balance between competing demands.

8. APS Employment Principles

Section 10A of the *Public Service Act 1999* sets out the APS Employment Principles, as follows:

The APS is a career-based public service that:

- (a) makes fair employment decisions with a fair system of review;
- (b) recognises that the usual basis for engagement and promotion is as an ongoing APS employee;
- (c) makes decisions relating to engagement and promotion that are based on merit;

- (d) requires effective performance from each employee;
- (e) provides flexible, safe and rewarding workplaces where communication, consultation, cooperation and input from employees on matters that affect their workplaces are valued;
- (f) provides workplaces that are free from discrimination, patronage and favouritism; and
- (g) recognises the diversity of the Australian community and fosters diversity in the workplace.

9. Roles and responsibilities

All employees of the Museum have responsibilities referred to in these Guidelines. The role and responsibility for an employee may vary, subject to the position held by the employee at a particular point in time.

9.1 The role and responsibility of the Director of the National Museum of Australia

The Director is responsible for upholding and promoting the APS Values and the APS Employment Principles.

In accordance with section 15(3) of the *Public Service Act 1999*, the Director is required to establish procedures for:

- determining whether an employee of the Museum or former employee of the Museum has breached the Code of Conduct; and
- determining the sanction (if any) that is to be imposed on an employee of the Museum who is found to have breached the Code of Conduct.

The Director's section 15(3) procedures are set out at Attachment A to these Guidelines.

The Director must have regard to any relevant standards and guidance issued by the APS Commissioner if an APS employee has engaged in conduct that:

- may breach the Code of Conduct; or
- raises concerns relating to effective performance.

In addition to the APS Values and APS Employment Principles, the Director may issue other instructions which set out procedures to be followed by, and standards of behaviour required of, an employee of the Museum.

9.2 The role and responsibility of members of the Senior Executive Service (SES) (including the Chief Operating Officer) and Associate Director in the National Museum of Australia Executive

All Senior Executive Service employees and the Associate Director at the Museum are required to uphold and promote the APS Values and APS Employment Principles, by personal example and other appropriate means.

In addition, SES employees and the Associate Director at the Museum may have specific responsibilities as decision-makers in relation to suspected breaches of the Code of Conduct,

where the Director has appointed the SES employee or Associate Director to a decision-making role in accordance with these Guidelines.

9.3 The role and responsibility of the Chief Operating Officer of the National Museum of Australia

The Chief Operating Officer has responsibility for ensuring relevant policies and procedures are maintained, published and promulgated to Museum employees. In addition, the Chief Operating Officer may provide support and advice to ensure consistent application of these Guidelines across the Museum.

9.4 The role and responsibility of the HR Manager and People Strategy Manager of the National Museum of Australia

The HR Manager and People Strategy Manager are responsible for the effective and confidential administration of Code of Conduct investigations, including:

- handling initial complaints about potential breaches of the Code of Conduct;
- maintaining and storing confidential records;
- ensuring matters impacting pay and conditions are promptly actioned; and
- passing information and advice about potential breaches of the Code of Conduct onto an appropriate decision-maker appointed in accordance with these Guidelines for consideration.

The HR Manager and People Strategy Manager are also responsible for providing information and advice to managers, employees and former employees involved in alleged breaches of the Code of Conduct, to ensure procedural fairness, equity and compliance with relevant procedures.

9.5 The role and responsibility of managers and supervisors of the National Museum of Australia

Managers and supervisors of the Museum are responsible for:

- ensuring their staff are aware of the APS Values and the APS Employment Principles;
- ensuring their staff understand what constitutes acceptable standards of conduct;
- ensuring the conduct of all employees in their work area is effectively monitored and maintained at a high standard;
- ensuring staff have access to relevant training courses and other material relevant to Code of Conduct, APS Values, APS Employment Principles and related matters;
- leading employees by example and maintaining high standards of personal behaviour and conduct;
- managing minor allegations of misconduct, quickly and with little formality, for example cases involving personality clashes or which are a result of a lack of capability on the employee's part (rather than unacceptable behaviour which is in the employee's control) and may be more appropriately handled using performance management processes, dispute resolution processes, counselling, training or other informal methods; and
- referring allegations of misconduct to a member of the Executive, the HR Manager or the People Strategy Manager, where the matter is considered serious or cannot be resolved using informal processes.

9.6 The role and responsibility of all employees of the National Museum of Australia

All employees of the Museum are responsible and accountable for:

- complying with the APS Code of Conduct, APS Values and APS Employment Principles and any lawful and reasonable directions issued by the Museum relating to standards of behaviour and conduct;
- reporting unacceptable behaviour or suspected misconduct;
- attending compulsory training and awareness sessions provided by the Museum in relation to the APS Values and APS Employment Principles; and
- constructively participating in discussions or counselling sessions to address workplace behaviour and conduct issues.

9.7 The role and responsibility of breach decision-makers and investigators appointed to undertake an investigation into an alleged breach of the Code of Conduct by an employee or former employee of the Museum

A breach decision-maker and/or investigator, appointed by the Museum to undertake an investigation into an alleged breach of the Code of Conduct, is responsible for complying with the processes outlined in these Guidelines and any specified terms and conditions contained within the terms of their appointment.

9.8 The role and responsibility of the Australian Public Service Commissioner and the Merit Protection Commissioner

Where appropriate, the Director may decide to refer a suspected breach of the Code of Conduct to the Australian Public Service Commissioner or the Merit Protection Commissioner for investigation.

The Australian Public Service Commissioner can investigate alleged breaches of the Code of Conduct by the Director and other statutory office holders. The Australian Public Service Commissioner can also investigate, when requested to do so by the Director or the Prime Minister, alleged breaches by employees and former employees.

The Merit Protection Commissioner is usually only involved where a non-SES employee requests the review of a determination that the employee has breached the Code of Conduct. However, the Merit Protection Commissioner may also undertake an inquiry into a suspected breach of the Code of Conduct, and determine whether a breach has occurred, at the request of the Director and with the written consent of the employee. If the Merit Protection Commissioner performs the Code of Conduct inquiry and makes a determination of breach, this finding is a reviewable decision under the *Administrative Decisions (Judicial Review) Act 1977*. It is expected that the Merit Protection Commissioner would only conduct an inquiry in very limited circumstances. Generally, the Museum retains the responsibility for investigating misconduct in the first instance and the Merit Protection Commissioner retains responsibility for review.

10. Kinds of personal information collected and held

The Museum receives information about individuals alleged to have engaged in inappropriate conduct of some form. These reports about alleged misconduct may include a range of different types of personal information about:

- persons who are alleged to have engaged in misconduct;
- the person making the report; and
- witnesses and other third parties.

The types of allegations received by the Museum range from alleged breaches of the APS Code of Conduct to alleged criminal activity.

If an investigation is undertaken, further information may be collected during the investigation.

10.1 How information is collected and held

Information about alleged misconduct is provided to the Museum by complainants and witnesses. Complainants and witnesses may be APS employees, including employees of the Museum, or members of the public. The Museum may seek further information about allegations. If a formal investigation is conducted, further information may be collected about the complaint or allegations.

Personal information relating to alleged misconduct (including about complainants and witnesses) is maintained on electronic files and access should be restricted to a very limited number of Museum employees whose duties require access to the information.

10.2 Purposes of collecting, holding, disclosing and using personal information

Personal information relating to alleged misconduct is collected and held for the purposes of the Museum's statutory functions under the *Public Service Act 1999*, including the Director's functions as an agency head in respect of the Museum. Personal information in connection with disclosable conduct is collected and held for the purposes of the Museum's statutory functions under the *Public Interest Disclosure Act 2013* (PID Act).

In circumstances where the Director appoints an external investigator, personal information may be disclosed to the investigator for the purposes of conducting the investigation. Where the investigator is a contracted service provider, appropriate contractual arrangements should be put in place to maintain confidentiality.

When allegations of misconduct are investigated, details of the allegations may be disclosed to the subject of the allegations as well as relevant witnesses and third parties. Information about

inappropriate conduct by APS employees in other agencies may be disclosed to the relevant agency head(s) in certain circumstances.

Information relating to a disclosure made under the PID Act should be handled in accordance with the requirements of the PID Act. The PID Act includes criminal penalties for inappropriate disclosure of information relating to disclosures made under the PID Act.

It may be necessary during the course of an investigation into alleged misconduct for the Museum to reveal the identity of a complainant (including a person who has made a disclosure under the PID Act) or a witness for procedural fairness reasons.

The Museum may also need to disclose the identities of complainants and witnesses if an employee who is determined to have breached the Code of Conduct challenges the decision (such as through review by the Merit Protection Commissioner or in the context of a legal challenge to the decision).

10.3 Authority to collect personal information

The Director has statutory functions under the *Public Service Act 1999* and the PID Act in relation to the collection and handling of information relating to alleged misconduct.

PART B – INITIAL STEPS

11. Reporting suspected breaches of the APS Code of Conduct

Employees of the Museum may report a suspected breach of the Code of Conduct by:

- submitting a written complaint to their manager, supervisor, the HR Manager or People Strategy Manager, or a member of the Executive;
- verbally advising their manager, supervisor, the HR Manager or People Strategy Manager, or a member of the Executive of the suspected breach of the Code of Conduct;
- if the report relates to a suspected breach by the Director or a statutory office holder, submitting a complaint to the Australian Public Service Commissioner; or
- submitting an internal public interest disclosure to an authorised officer.

In certain circumstances, the Museum is required to treat a report of an alleged breach of the Code of conduct as a public interest disclosure for the purposes of the *Public Interest Disclosure Act 2013* (PID Act). Further detail on the interaction between misconduct investigations and PID Act investigations is set out at paragraph 12.1 of these Guidelines.

Sometimes allegations are proven to be unsubstantiated, and sometimes allegations are misconceived (i.e. the alleged conduct would not be a breach of the Code of Conduct) or made vexatiously. How the matter is handled will depend on the circumstances of each case.

Not all suspected breaches of the Code of Conduct are formally reported. A suspected breach of the Code of Conduct may be observed by a manager or another employee. Employees and supervisors have a responsibility to report suspected breaches of the Code of Conduct, consistent with the duty to act with integrity and the highest ethical standards. A failure to report a suspected breach may, in some circumstances, itself warrant consideration as a breach of the Code.

The Museum may decide to investigate suspected breaches of the Code of Conduct, even where it has not received a formal complaint or report.

Employees may report suspected breaches anonymously. However, this may limit the ability of the Museum to properly investigate the alleged breach. The identity of the person who reports misconduct or provides witness statements should be kept confidential as far as the law allows. However, in some cases the identity of the person reporting the misconduct or the identity of witnesses will be key information that must be disclosed to the accused employee in order to provide that employee with a proper opportunity to respond (where this is consistent with the Museum's obligations under the PID Act, discussed further below). Before this is done, it is advisable to notify the reporting employee or witnesses of the disclosure and the protections available to them, and encourage them to report any behaviours that they regard as retaliatory. It is also advisable to notify employees who wish to report suspected misconduct anonymously, or wish to provide witness statements in confidence, that the Museum will seek to keep their identity confidential as far as possible but cannot give any guarantee of confidentiality.

Where the report is a disclosure under the PID Act, extra care should be taken when managing the identity of the discloser as it is an offence to disclose the identity of the discloser unless the information is used for the purposes of the PID Act or taking action in response to a disclosure investigation.

Employees who report alleged misconduct in good faith are legally protected from victimisation and discrimination. In general, these protections also extend to witnesses in a Code of Conduct investigation. Where the report is a disclosure under the PID Act, specific protections are provided by that Act. If there is a real risk of retaliatory action being taken, the Museum may consider mitigation strategies proportionate to the level of risk identified.

12. Preliminary investigation: Whether to start a formal misconduct action

12.1 Interaction between PID Act investigations and investigations of alleged misconduct

Where a report of a suspected breach of the Code of Conduct is received by an authorised person for the purposes of the PID Act and otherwise meets the requirements of the PID Act,

then the matter should be dealt with under the PID Act and in accordance with the PID Procedures.

Where a disclosure under the PID Act alleges a breach of the Code of Conduct, the Director may choose to:

- conduct a PID investigation separately to determine whether there is sufficient substance to the allegation to warrant investigation as a suspected breach of the Code of Conduct under these Guidelines;
- carry out an investigation simultaneously under these Guidelines and the PID Act; or
- decide not to investigate the disclosure further based on any of the grounds set out in section 48 of the PID Act, including where an investigation into the same, or substantially the same, conduct is already being carried out under these Guidelines.

A separate PID investigation may be undertaken in a relatively short timeframe and may focus on whether there is sufficient substance to the allegations to merit investigation as a suspected breach of the Code. The Director will prepare a report in accordance with the PID Act, which may include a recommendation or determination as to whether or not misconduct action is to be commenced under these Guidelines. Where this occurs, the matter should be referred to HR, unless the Director determines that it is appropriate in the circumstances to refer the matter to another work area or individual within the Museum.

12.2 Informal or formal action?

It is the responsibility of the manager, supervisor or other Museum employee who first becomes aware of the suspected breach of the Code of Conduct to decide the best approach for handling the issue. The recipient of the information may choose to resolve issues informally, if the misconduct is not deemed to be sufficiently serious to warrant a formal investigation process, and an informal resolution is considered appropriate, effective and timely.

Each case will be different and it is difficult to generalise the reasons why a process other than a formal misconduct process would be chosen. 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 occurrence, informal options such as counselling, performance management, training or mediation may be more appropriate. Informal options for resolution should be considered in the first instance, but do not need to be explored if a formal determination would be more appropriate in the circumstances.

Where a manager or supervisor decides to handle a suspected breach of the Code of Conduct using an informal process:

- the procedures in Attachment A will not apply; and
- there will be no determination in relation to whether the employee has breached the Code of Conduct.

Nevertheless, the manager or supervisor should keep a written record of the issue, the reasons for deciding to adopt an informal process and the steps taken to address the issue.

If an informal option is not appropriate, and the manager or supervisor suspects that a breach of the Code of Conduct may have occurred, they should refer the issue to the HR Manager or People Strategy Manager, who will then refer the issue to the Director for consideration. Alternatively, the manager or supervisor could refer the issue directly to the Director for consideration if this is more appropriate in the circumstances.

If the matter is referred to the Director for consideration, the Director should:

- consider all of the information available relating to the suspected breach of the Code of Conduct;
- where the alleged conduct of the employee raises concerns that relate both to effective performance and to possible breaches of the Code, have regard to any relevant standards and guidance issued by the Australian Public Service Commissioner for the purposes of sections 39 and 40 of the *Australian Public Service Commissioner's Directions 2016*, set out in paragraphs 5.1.5 to 5.1.9 of the *Australian Public Service Commission Handling Misconduct: A human resource manager's guide (APSC Guide)*;
- where unacceptable behaviour appears to be the result of an underlying medical condition, consider seeking a medical opinion to establish whether there is a causal link; and
- decide, based on the available information, whether to proceed to a formal investigation of the alleged breach of the Code of Conduct or use other, less formal processes for dealing with the suspected breach, if appropriate.

When considering whether to initiate a formal process under the Museum's section 15(3) procedures, the Director should determine whether the allegations are sufficiently substantial as to warrant further investigation. The Director does **not** need to establish whether the evidence establishes that a breach of the Code of Conduct has probably occurred.

The Director may choose to refer a suspected breach of the Code of Conduct to the Australian Public Service Commissioner or, with the written consent of the employee or former employee, to the Merit Protection Commissioner for investigation. On referral, the APS Commissioner or Merit Protection Commissioner may decide to investigate the allegations or decline to investigate. The decision to refer a matter to either Commissioner is discretionary and whether the Director does refer the incident to either Commissioner will depend on the particular circumstances of the suspected breach.

13. Decision to reassign duties or suspend an employee

The Director may decide to suspend an employee with or without pay if the Director believes on reasonable grounds that the employee has, or may have, breached the Code of Conduct, and the employee's suspension is in the public, or the Museum's, interest. Alternatively, the Director may decide that it is more appropriate to assign new duties to the employee for a temporary period.

In exercising these powers, it is important that the Director does not prejudge, or be seen to prejudge, whether misconduct has occurred. The Director should have due regard to procedural fairness unless satisfied on reasonable grounds that, in the circumstances, it would not be appropriate. Reassignment or suspension should not to be used as sanctions.

13.1 Reassignment of duties

In considering whether the reassignment of duties is appropriate when an employee is suspected of breaching the Code of Conduct, the Director should consider:

- whether it is in the Museum's best interests for the employee to be reassigned duties;
- the proposed period for reassignment;
- the duties and location for the reassignment;
- the capabilities of the employee being reassigned duties;
- if relevant, the impact of the reassignment on the employee; and
- work availability for the employee being reassigned duties.

If a decision is made to reassign an employee to other duties prior to, or during the process of determining whether a breach of the Code of Conduct has occurred and whether a sanction should be applied, the Director should:

- inform the employee of the proposal to reassign them to other duties in writing;
- advise the employee of the details of the proposed assigned role and relevant supervisory and reporting lines;
- advise the employee of the proposed period for the reassignment and recommended review date; and
- provide the employee with a reasonable opportunity to comment on the proposed reassignment of duties and to present in writing any information that should be taken into consideration by the decision-maker before any decision is made.

If the circumstances do not allow for an employee to have the opportunity to comment on a proposed reassignment of duties prior to a decision being made, the Director should ensure that the employee is advised of the decision and relevant details and offered an opportunity to comment in writing on the reassignment decision. The Director may choose (after considering any information provided by the employee) to consider other options, including suspension from duty.

The reassignment of duties should not involve a reduction in the employee's classification, unless the employee has either consented to the reduction or one of the circumstances in section 23(4) of the *Public Service Act 1999* applies.

13.2 Suspension from duty

The Director may suspend an employee from duty, with or without pay, if there are reasonable grounds to believe that the employee has, or may have, breached the Code of Conduct and the employee's suspension is in the public or the Museum's interest.

Examples of circumstances where a suspension may be in the public or Museum's interests include where:

- the suspected breach would, if sustained, likely result in termination of employment;
- the employee's presence in the workplace involves an ongoing threat to the wellbeing or safety of other Museum employees or visitors or damage to Museum property;
- the employee's presence in the workplace could result in further breaches of the Code of Conduct;
- the employee's presence in the workplace could prejudice or impede a criminal or other investigation; or
- the employee's presence in the workplace has the potential to damage the public reputation of the Museum.

If the Director determines that suspension from duty is appropriate, he or she must also decide whether the suspension is to be with or without pay. Factors that may be taken into consideration when making this decision include:

- the seriousness of the suspected misconduct;
- whether suspension without remuneration would give the employee an added incentive to cooperate with the investigation;
- the estimated duration of the misconduct action; and
- the likely financial hardship, if any, for the employee.

A decision to suspend must be reviewed at reasonable intervals to determine whether the employee's suspension is to continue. Suspension without pay cannot be for more than 30 calendar days, unless there are exceptional circumstances.

Exceptional circumstances could include (without limitation) circumstances where:

- a strong prima facie case of serious misconduct is apparent;
- a finding has been made of a serious breach of the Code of Conduct and a sanction is yet to be imposed;
- an employee has been charged with a criminal offence and is waiting to have the charge heard and determined; or
- an employee has appealed against a conviction and is waiting to have the appeal heard.

The Director should have due regard for procedural fairness, unless the Director is satisfied on reasonable grounds that, in the particular circumstances, it would not be appropriate. For example, if a decision is made to suspend an employee the Director should:

- inform the employee of the proposal to suspend from duty in writing;
- inform the employee that the proposal to suspend is with or without pay;
- inform the employee that they are to advise the Museum of any changes to contact details whilst on suspension as soon as possible;

- advise the employee of the proposed period for the suspension and recommended review date;
- advise the employee about access to leave credits, access to Museum premises, access to Museum Information and Communications Technology (ICT) services, their status in respect of training, or other pre-arranged work activities, their entitlement to access outside employment and arrangements for the review of their suspension;
- provide the employee with a reasonable opportunity to comment on the proposed suspension and to present in writing any information that should be taken into consideration by the Director before any decision is made; and
- inform the employee of their right of reviews of the original decision to suspend the employee under section 33 of the *Public Service Act*.

If the circumstances do not allow for an employee to have the opportunity to comment on a proposed suspension prior to a decision being made, for example if the employee has been suspended immediately for the safety of employees, the Director should ensure that the employee is advised of the decision, reasons for the decision and other relevant details and offered an opportunity to comment in writing on the suspension decision. If an employee provides information or arguments that have a bearing on whether they should be suspended from duty, then the decision-maker should take that material into account when deciding whether to suspend the employee or when reviewing the decision.

An employee suspended on pay should continue to receive regular and routine allowances, penalties and loadings.

Suspension must immediately end if:

- the Director no longer believes on reasonable grounds that the employee has or may have breached the Code of Conduct;
- it is no longer in the public or the Museum's interest to continue the employee's suspension; or
- a sanction is imposed for breaching the Code of Conduct.

The Director should inform the employee of the decision to cease the suspension in writing.

PART C – GUIDANCE FOR DETERMINING BREACHES OF THE CODE OF CONDUCT

14. Introduction

Attachment A sets out the procedures for determining whether an APS employee, or former APS employee, in the Museum has breached the Code of Conduct, established by the Director pursuant to section 15(3)(a) of the Public Service Act (**s15(3) Procedures**). This Part C provides further guidance to relevant decision-makers on the application of the s15(3) Procedures, but does not form part of those procedures.

15. Initiating a Code of Conduct process

If it is decided that the alleged misconduct warrants investigation under the Museum's s15(3) Procedures, the Director should appoint a decision-maker to determine whether there has been a breach of the Code of Conduct (**breach decision-maker**). This appointment should be made in writing.

A breach decision-maker may either conduct the investigation themselves or use an investigator. If using an investigator, the breach decision-maker should:

- select and appoint a suitably qualified or experienced person who is, and appears to be, unbiased to undertake the investigation into the allegations of the suspected breach of the Code of Conduct; and
- determine whether the investigator is to be appointed to:
 - a) assist the breach decision-maker with an investigation into part or all of the suspected misconduct; or
 - b) conduct an investigation and make a recommendation about whether a breach of the Code of Conduct has occurred (which may include making a recommendation about sanction).

The breach decision-maker and/or the investigator may be a person from outside the Museum. The breach decision-maker, investigator and sanction decision-maker may all be the same person, although it is advisable that at least two different people perform these functions. A person from outside the Museum must not be appointed as sanction decision-maker without approval from the Australian Public Service Commissioner.

15.1 Notification to the affected employee(s) or former employee(s)

An employee suspected of breaching the Code of Conduct should be notified in writing as soon as practicable of the following:

- the details of the suspected breach of the Code of Conduct (including any subsequent variation of those details);
- the elements of the Code of Conduct that are relevant to the suspected breach;
- the potential range of sanctions that may be imposed if the employee is determined to have breached the Code of Conduct;
- the details of the investigator (if any) appointed to undertake the investigation;
- the details of the breach decision-maker who will make the determination of breach (if not the same person as the investigator);
- representational rights for the employee during the investigation process;
- if relevant, any details relating to the proposed or actual reassignment of duties or suspension;
- details of the employee's right of review for any decisions;
- that personal information about them may be disclosed to others where necessary and that any disclosure will be in accordance with the *Privacy Act 1988*;

- details of the Museum's Employee Assistance Provider and the Museum's Workplace Support Officer program; and
- any other directions in relation to the matter that the breach decision-maker consider appropriate.

Former employees suspected of breaching the Code of Conduct should also be notified in writing as soon as practicable. The former employee should be notified of the same information as provided to an employee, except the potential range of sanctions that may be imposed. Again, the breach decision-maker (or where relevant, investigator) should take all reasonable steps to ensure that the former employee is provided with relevant information.

The breach decision-maker (or where relevant, investigator) may choose to include additional information or documentation with the notification to the employee or former employee. That information may include:

- a copy of the Code of Conduct and these Guidelines;
- a copy of any documentation or material that the breach decision-maker or investigator may intend relying upon in making a decision or recommendation;
- a privacy collection notice to advise the employee that their personal information will be collected, the uses it will be put to and the circumstances in which it may be disclosed; and
- any other material or documentation relevant to the particular circumstances of the matter.

It is recommended that legal advice be sought when preparing the notification to an employee or former employee who is suspected of breaching the Code of Conduct.

15.2 Effect of ceasing employment

The Director may still decide to commence an investigation into a suspected breach of the Code of Conduct even if a person's APS employment has ceased. Factors that may be considered by the Director when determining whether to commence an investigation against a former employee include:

- any damage that may be caused to the Museum's reputation if an investigation were not undertaken;
- whether it is possible to ensure procedural fairness in the circumstances (for example, any restrictions on the ability of the former employee to access information and records may impact on the former employee's ability to respond to the allegations); and
- the availability of, and ability to collect, evidence.

15.3 Effect of inter-agency moves

A transfer or promotion to the Museum, or from the Museum to another agency, of an employee who is suspected of breaching the Code of Conduct and who has been informed of the suspected breach and the sanctions that may be imposed if the misconduct is proven, will not

take effect until the matter is resolved unless the Director and the Agency Head of the gaining agency agree to the move taking effect at an earlier date. The matter will be deemed to be resolved when a determination is made or it is decided that a determination is not necessary.

15.4 Misconduct prior to engagement of APS employee

The Museum may investigate misconduct which is alleged to have occurred prior to an employee's engagement in the APS in certain circumstances. If an employee:

- knowingly provided false or misleading information,
- failed to disclose information they knew or ought have known was relevant, or
- otherwise failed to behave honestly and with integrity,

in connection with their engagement as an APS employee, the Museum may choose to investigate the matter as a suspected breach of the Code of Conduct.

The Museum's recruitment procedures outline the requirement for the Human Resources team to seek information from applicants about current or past investigations. It is expected that all candidates will make a full disclosure about such matters and failure to do so could be a breach of the Code of Conduct.

16. The investigation process

A breach decision-maker, and where an investigator has been appointed, the investigator, should comply with these Guidelines, the section 15(3) Procedures, and any other specified terms and conditions contained within the terms of their appointment. In addition, a breach decision-maker (and where relevant, investigator) should uphold the APS Values, conduct the investigation consistent with the requirements of procedural fairness and other administrative law principles.

A breach decision-maker (and, where relevant, investigator) should be a suitably qualified or experienced person. All investigations should be carried out with as little formality as possible and completed in a timely manner.

The Museum recognises that, subject to the nature and complexity of matters related to suspected misconduct, the specific process and timeline for conducting a Code of Conduct investigation may vary. If required by the Director, the breach decision-maker (or, where relevant, the investigator) should submit and have approved by the Director an investigation plan outlining details of the proposed approach to the investigation before any work commences. The plan should include at least the following:

- proposed methodology for the investigation, that is how the investigation will be conducted;
- timeframes and dates for each key milestone and the estimated completion date; and
- details of witnesses to be contacted and estimated timeframes.

The investigation plan should also comply with the guidance set out in this Part C and the section 15(3) Procedures.

An employee, or former employee, suspected of breaching the Code of Conduct should be afforded the opportunity to respond to the allegation(s) against them, (either in writing or orally or both) and be provided with a reasonable opportunity to submit evidence that they consider relevant to their defence of the allegation. If after the initial notification to the employee, or former employee, the details of the suspected breach change, the employee or former employee, should be informed of the changes, provided with a copy of any relevant documents and invited to make a further submission.

16.1 Gathering evidence

A breach decision-maker (or, where relevant, investigator) may collect information from various sources, including written statements, interviews, documentation and/or physical evidence. Evidence discovered during the course of an investigation should only be collected or elicited by lawful and reasonable means.

16.2 Interviews

If conducting interviews, the breach decision-maker (or, where relevant, investigator) should provide the interviewee with sufficient notice to allow for adequate preparation. A minimum period of two working days' notice should be provided to the interviewee, unless this is not practical in the circumstances. The interviewee may request an extension of time to prepare for an interview. The breach decision-maker (or, where relevant, investigator) should consider the need to be fair to the employee and the requirement for timeliness in completing the investigation when considering extension requests.

At the time of notifying the interviewee of the interview time, date and location, the breach decision-maker (or, where relevant, investigator) should also inform the person:

- that they are entitled to bring a support person to the interview;
- that they may submit relevant documentation for discussion at interview prior to the interview; and
- to provide any relevant details of any need for reasonable adjustments to be made to allow them to participate in the interview (for example, a request for an interpreter to be present).

Prior to commencing the interview, the breach decision-maker (or, where relevant, investigator) should advise the interviewee:

- whether the interview will be recorded and their entitlement to be provided with a copy;
- that a record of the discussion will be prepared and that they will be provided with an opportunity to verify the accuracy of their statement;
- that the record of interview will form part of the final investigation report (if any); and

- that personal information relating to them may be disclosed to the employee and others where necessary and appropriate and that any personal information will be handled in accordance with the *Privacy Act 1988*.

If during the investigation process, the breach decision-maker (or, where relevant, investigator) becomes aware of information that requires further clarification, a person may be re-interviewed in relation to those matters.

16.3 Written statements

An employee or former employee suspected of breaching the Code of Conduct may be invited by the breach decision-maker (or, where relevant, investigator) to submit a written response to the allegations. The written response may be in addition to an interview or instead of an interview, depending on the situation.

16.4 Report of findings

The breach decision-maker, or where an investigator has been appointed, the investigator, should prepare a written report that:

- outlines the nature of the alleged misconduct;
- outlines the steps or process undertaken to collect evidence and information;
- presents the evidence in a balanced way, including the employee or former employee's response to the allegations and the employee or former employee's response to any new or conflicting evidence that was uncovered in the course of the investigation;
- outlines the factual conclusions that are able to be made on the available evidence, including any inconsistencies in the evidence or issues that remain unclarified;
- makes a determination (or where an investigator has been appointed and the investigator has been engaged to do so, a recommendation) about whether the employee or former employee has breached the Code of Conduct and specifies which elements of the Code of Conduct have been breached or not and reasons why this conclusion has been reached. The balance of probabilities test should be applied when determining or recommending whether the employee or former employee has breached the Code of Conduct. The investigator should be satisfied that it is "more likely than not" that the breach occurred;
- makes recommendations (if engaged to do so) about the proposed sanctions for an employee who is found to have breached the Code of Conduct; and
- contain as appendices any statements or other material used to support the recommendations of the report.

16.5 Preliminary view that a breach has occurred

If, after considering all available evidence (including the employee's response, if any, and the investigator's report, if any), the breach decision-maker is of the view that, on the balance of

probabilities, the employee or former employee is more likely than not to have breached the Code of Conduct, the breach decision-maker should inform the person in writing that they have formed a preliminary view that the Code of Conduct may have been breached.

The written advice to the employee or former employee should include:

- a statement that a preliminary view has been formed that the employee or former employee has breached the Code of Conduct;
- the elements of the Code of Conduct that the breach decision-maker considers that the employee or former employee has breached (including any variations of those details); and
- the reasons for the preliminary conclusion, including copies of any relevant documentation on which the breach decision-maker intends to rely (if these have not already been provided during the investigation).

There is no obligation on the breach decision-maker to provide the employee or former employee with a full copy of the investigation report.

The employee or former employee should be provided with a period of seven calendar days to respond and provide any other information to the breach decision-maker for consideration before the determination is made about whether one or more breaches of the Code of Conduct have occurred (unless a different period is appropriate in the circumstances). The employee or former employee should be advised that the response to the preliminary finding should be provided in writing. The breach decision-maker should take into consideration any information provided by the employee or former employee before making the determination. An employee or former employee may request in writing that the seven-day response period be extended if there are extenuating circumstances or there is insufficient time to respond to the preliminary finding(s).

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

Further guidance can be found in Appendix 9 to the APSC Guide "Making a decision about a breach of the APS Code of Conduct checklist".

17. Considering a determination in relation to suspected breaches of the Code of Conduct

17.1 No breach of the Code of conduct

If the breach decision-maker has made a finding that there has been no breach of the Code of Conduct, the breach decision-maker should advise the relevant employee or former employee in writing of the outcome of the investigation and include reasons for the decision. The breach decision-maker may choose to provide the employee or former employee with a copy of the investigation report for their records, but is not required to do so.

The decision-maker may also advise complainant(s) in writing of the outcome of the investigation (such as factual findings made during the investigation), but is not required to do so.

17.2 A breach of the Code of Conduct has been found

If the breach decision-maker has made a finding that a breach of the Code of Conduct has occurred, the breach decision-maker should write to the employee informing them of their final decision. The letter should:

- include the factual findings on which the decision that a breach has occurred is based and the reasons for their decision;
- inform the employee of the person who will be determining the sanctions, reiterate the range of possible sanctions, and what the next steps of the process will involve; and
- notify the employee of their right to seek review of the findings under section 33 of the *Public Service Act*, noting that seeking a review will not operate to stay the finding of breach or consideration of the sanction.

The breach decision-maker may choose to provide the employee or former employee with a copy of the investigation report for their records, but is not required to do so.

PART D – GUIDANCE FOR DETERMINING SANCTION (IF ANY)

18. Introduction

Attachment A sets out the procedures for determining the sanction (if any) to be imposed on an employee in the Museum who is found to have breached the Code of Conduct, established by the Director pursuant to section 15(3)(b) of the Public Service Act (**s15(3) Procedures**). This Part D provides further guidance to relevant decision-makers on the application of the s15(3) Procedures, but does not form part of those procedures.

19. Considering sanctions in relation to breaches of the Code of Conduct

If a determination is made that an employee of the Museum has breached the Code of Conduct, a sanction decision-maker will need to consider whether a sanction is to be imposed on the employee.

The sanction decision-maker should be appointed by the Director, and may be the same person as the breach decision-maker or a different person. It is generally advisable that two different decision-makers be appointed to determine breach and sanction.

The sanction decision-maker must hold a delegation from the Director to impose a sanction from the range set out in section 15(1) of the *Public Service Act 1999*. A person outside the APS must not be appointed to this role without the approval of the Australian Public Service Commissioner.

The only sanctions available to a sanction decision-maker under the *Public Service Act 1999* are:

- termination of employment

- reduction in classification
- re-assignment of duties
- reduction in salary
- deductions from salary, by way of a fine
- a reprimand.

A determination that misconduct has occurred does not necessarily mean that a sanction under the *Public Service Act 1999* must be imposed. A decision can be taken that other administrative or remedial action may be appropriate (for example, restricting an employee's access to the internet following a finding of internet misuse). Such action could be taken in addition to a sanction if it is likely to assist the employee to change their future behaviour. This should be documented as a managerial decision and not specified as a sanction.

The sanction decision-maker may decide to impose one of the above sanctions or, where appropriate, a combination of the above sanctions (for example, reassignment of duties and a deduction from salary).

A sanction cannot be imposed on a former employee.

Further guidance can be found at Appendix 10 to the APSC Guide "Sanction decision-making checklist".

19.1 Factors to be considered by the decision-maker determining sanction(s)

Sanctions should be proportionate to the nature of the breach, be a deterrent to the employee and others and demonstrate that misconduct is not tolerated in the Museum. The sanction should focus on the seriousness of what the employee has done, not the number of breaches.

A range of factors may be relevant to determining the appropriate sanction to impose.

Prior misconduct

In considering an appropriate sanction, the sanction decision-maker should consider whether the employee has a history of misconduct. If the employee has a prior misconduct history, the sanction decision-maker may consider:

- whether the employee should have been aware of the required standard of conduct and the potential consequences of misconduct; or
- if the employee appears to demonstrate an unwillingness to adhere to the standard of conduct expected.

Nature and seriousness of the breach

The sanction decision-maker should also take into consideration the nature and seriousness of the breach, including:

- the type of conduct involved (for example, discourtesy as compared to physical assault);

- amounts, values or quantities (for example, minor amounts of photocopying for personal use as compared to running a business using agency facilities);
- the period over which the misconduct occurred;
- evidence of any personal benefit from the breach; and
- the actual and potential consequences of the employee's conduct.

Employment history

The sanction decision-maker should give consideration to the employment history of the employee and whether the conduct is uncharacteristic, including:

- the length of service of the employee;
- whether there are records of previous counselling about related issues;
- the extent to which the behaviour is atypical;
- the employee's attempts to stabilise any personal situations impacting on work (for example, by utilising the Employee Assistance Program); and
- other support or references from colleagues or supervisors.

Response to misconduct and the likelihood of a recurrence

The sanction decision-maker should give consideration to how the employee has responded to the misconduct and the likelihood of there being a recurrence, including:

- whether the employee admits the breach, shows a willingness to take responsibility, shows remorse and understands the seriousness of the breach;
- cooperation during the investigation; and
- whether the employee has reflected on the action and how it can be avoided in the future.

Effect of the proposed sanction on the employee

The sanction decision-maker should consider the effect of the proposed sanction on the employee including, but not limited to, any potential loss of earnings that have already been incurred by the employee as a result of any suspension.

Mitigating factors

A sanction decision-maker should consider whether any mitigating circumstances warrant a lesser sanction than might otherwise be imposed. Examples of mitigating circumstances include:

- the degree of responsibility for the breach and whether there was any provocation, persuasion or coercion by others;
- the intention of the employee to breach the Code of Conduct (including whether the breach was premeditated or on the spur of the moment);
- the extent to which the employee's disability, health or other factors may have influenced their conduct;
- age, experience and length of service;
- level of guidance provided by the Museum on standards of conduct; and
- any procedural matters, including delays in the process.

19.2 Sanctions for multiple breaches

It is not necessary to impose a separate sanction for each breach of an element of the Code of Conduct. However, separate sanctions may be appropriate in respect of unrelated breaches, for example a harassment incident and an unrelated fraud incident.

The sanction or sanctions imposed on an employee who has breached several elements of the Code of Conduct should be determined by considering the totality of the behaviour and the seriousness of the breaches.

19.3 Preliminary advice to the employee on proposed sanction(s)

Before a sanction can be imposed on an employee, the sanction decision-maker should take reasonable steps to inform the employee in writing of:

- the determination on breach of the Code of Conduct;
- the sanction or sanctions that are under consideration; and
- factors that are relevant to the proposed sanction to be imposed.

The employee should be provided with a period of seven calendar days to respond to the proposed sanction and provide any other information to the sanction decision-maker for consideration before a final decision is made about the sanction or sanctions to be imposed (unless a different period is appropriate in the circumstances). The employee should be advised that the response to the proposed sanction is to be provided in writing. The sanction decision-maker should take into consideration any information provided by the employee before making a final decision in relation to a sanction or sanctions. An employee may request in writing that the seven-day response period be extended if there are extenuating circumstances.

The sanction decision-maker is responsible for documenting the reasons for the final decision on sanction and the date for it to come into effect.

The sanction decision-maker should advise the employee in writing of the final decision in relation to sanction and the effective date, including the reasons for that decision.

20. Review of actions

Non-SES employees may seek a review of an action by a decision-maker, including an external investigator appointed by the Museum, in relation to matters relevant to suspected breaches of the Code of Conduct, determinations or sanctions, except termination of employment. Applications for review should be directed to the Merit Protection Commissioner.

The review provisions of the *Public Service Act 1999* do not apply to termination of employment. The *Fair Work Act 2009* set out rights and remedies in relation to termination of employment.

Former non-SES employees may also apply to the Merit Protection Commission for a review of a determination by the decision-maker, made after the affected former employee's employment ceased, that the former employee has breached the Code of Conduct.

Further information on reviews of actions under the *Public Service Act 1999*, including the role of the Merit Protection Commissioner, is available on the Australia Public Service Commission website at www.apsc.gov.au/merit.

21. Record-keeping, record disposal and disclosure of misconduct information

Records of disciplinary action such as Code of Conduct investigations and their outcomes are regarded as personal information. They are subject to the *Archives Act 1983*, the *Freedom of Information Act 1982* and the *Privacy Act 1988*. Records of action under these Guidelines should not be placed on the employee's personal file but on a separate misconduct action or investigation file and the file should be classified as "Sensitive: Personal", held securely and accessed only on a strict need to know basis. However, a cross-reference to the separate file should be recorded in the employee's personal file.

If a determination is made in relation to a suspected breach of the Code of Conduct by an APS employee, a written record must be made of:

- The suspected breach; and
- The determination; and
- Any sanctions imposed as a result of the determination; and
- If a statement of reasons is given to the employee, the statement of reasons.

21.1 Retention and disposal

The employee's misconduct or investigation file should be disposed of in accordance with the National Archives of Australia's Administrative Functions Disposal Authority Express.

21.2 Access to and disclosure of misconduct information

The Museum should comply with the requirements of the *Privacy Act 1988*, *Public Service Act 1999*, and *Public Service Regulations 1999*, when managing access to and disclosure of misconduct information.

The Museum may use or disclose personal information (including information relating to a Code of Conduct matter), where it is necessary, and relevant to, the employer powers of the Museum, another APS agency head, the Australian Public Service Commissioner or Merit Protection Commissioner.

22. References

Public Service Act 1999
Public Service Regulations 1999

Australian Public Service Commissioner's Directions 2016

Australian Public Service Commission Handling Misconduct: A human resource manager's guide

Privacy Act 1988

Public Interest Disclosure Act 2013