



**NDIS Quality
and Safeguards
Commission**

Procedures for determining breaches of the Australian Public Service (APS) Code of Conduct and for determining sanction.

In accordance with subsection 15(3) of the *Public Service Act 1999* (the Act), the NDIS Quality and Safeguards Commissioner (NDIS Commissioner), as the Agency Head of the NDIS Quality and Safeguards Commission (the NDIS Commission) has established procedures for determining whether an APS employee, or former employee, in the NDIS Commission has breached the APS Code of Conduct (the Code), and for determining sanctions.

These procedures are made publicly available in accordance with subsection 15(7) of the Act.

I, **Michael Phelan**, as Agency Head of the NDIS Quality and Safeguards Commission, establish these procedures under subsection 15(3) of the Act.

These procedures commence on the date signed.

These procedures supersede the previous procedures made for the NDIS Commission under subsection 15(3) of the Act, but the previous procedures may continue to apply for transitional purposes.

Michael Phelan APM
Acting NDIS Commissioner

Dated this *18th* day of July 2024.

Application of procedures

1. These procedures apply in determining:
 - a. whether a person who is an APS employee in the NDIS Commission, or who is a former APS employee who was employed in the NDIS Commission at the time of the suspected misconduct, has breached the Code as outlined in section 13 of the Act, and including any other conduct requirement prescribed by the *Public Service Regulations 2023*
 - b. any sanction to be imposed on an APS employee in the NDIS Commission who has been found under these procedures to have breached the Code.
2. These procedures, as they apply to determining:
 - a. whether there has been a breach of the Code, apply to any suspected breach of the Code except for one in respect of which a decision had been made before the date these procedures commence to begin an investigation to determine whether there had been a breach of the Code.
 - b. any sanction for breach of the Code, apply where a sanction decision is under consideration on or after the date these procedures commence.
3. In these procedures, a reference to a breach of the Code by a person includes a reference to a person engaging in conduct set out in subsection 15(2A) of the Act in connection with their engagement as an APS employee.

Additional procedural requirements

4. In accordance with section 64 of the *Australian Public Service Commissioner's Directions 2022*, if an SES employee in the NDIS Commission is suspected of breaching the Code, the NDIS Commissioner must consult with the Australian Public Service Commissioner (APSC) on the process for determining whether the employee has breached the Code **and**, if considering imposing a sanction, consult the APSC before any sanction is imposed.

Selecting a breach decision-maker and sanction decision-maker

Note: in relation to SES employees, the NDIS Commissioner is required under section 64 of the *Australian Public Service Commissioner's Directions 2022* to consult with the APSC on the process for determining a breach of the Code. This may result in additional procedural requirements.

5. Under section 15(1) of the Act, the NDIS Commissioner may impose a sanction/s specified in that provision on an APS employee who is found to have breached the Code. The NDIS Commissioner may delegate this power to another person (a sanction delegate).
6. As soon as practicable after a suspected breach of the Code has been identified and the NDIS Commissioner, or a person authorised by the NDIS Commissioner, has decided to deal with the suspected breach under these procedures, the NDIS Commissioner or that person will:
 - a. select a decision-maker to make a determination under these procedures (the breach decision-maker), and
 - b. decide whether the NDIS Commissioner or a sanction delegate is to make any decision required about imposing sanctions (the sanction decision-maker)
 - c. if a sanction delegate is to make the decision about imposing sanctions, identify the relevant delegate.

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7. These procedures do not prevent the breach decision-maker from being the sanction decision-maker in the same matter.
 8. These procedures do not prevent the NDIS Commissioner or the person authorised to deal with the suspected breach from selecting themselves as the breach decision-maker or the sanction decision-maker.

Person or persons making breach determination and imposing any sanction to be independent and unbiased

9. The breach decision-maker and the sanction decision-maker must be, and must appear to be, independent and unbiased.
10. The breach decision-maker and the sanction decision-maker must advise the NDIS Commissioner in writing if they consider that they may not be independent and unbiased or if they consider that they may reasonably be perceived not to be independent and unbiased; for example, if they are a witness in the matter.

The breach determination process

Note: in relation to SES employees, please note the information under the heading 'additional procedural requirements' earlier in these procedures.

11. The breach decision-maker must carry out the process for determining whether a person who is, or was, an APS employee in the NDIS Commission has breached the Code with as little formality, and with as much expedition, as a proper consideration of the matter allows.
12. The breach decision-maker may undertake the investigation or seek the assistance of an investigator. The investigator may investigate the alleged breach, gather evidence and make a report of recommended findings of fact to the breach decision-maker.
13. The process for determining whether a breach of the Code has occurred must be consistent with the principles of procedural fairness.

Note: Procedural fairness generally requires that:

- the person suspected of breaching the Code is informed of the case against them (i.e.: any material before the breach decision-maker that is adverse to the person or their interests and that is credible, relevant and significant)
 - the person is provided with a reasonable opportunity to respond and state their case in accordance with these procedures, before any decision is made on breach or sanction.
14. The breach decision-maker may not make a determination in relation to a suspected breach of the Code by a person unless the breach decision-maker has taken reasonable steps to
 - a. inform the person of:
 - i. the details of the suspected breach of the Code, including any subsequent variation of those details
 - ii. where the person is an APS employee, the sanctions that may be imposed on them under subsection 15(1) of the Act
 - b. give the person a reasonable opportunity to make a statement in relation to the suspected breach.

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15. The statement may be a written or oral statement and should be provided by the person within 21 calendar days or any longer period that is allowed by the breach decision-maker.
 16. A person who does not make a statement in relation to the suspected breach may not, for that reason alone, be taken by the breach decision-maker to have admitted to committing the suspected breach.
 17. The breach decision-maker is not required to conduct a formal hearing to determine whether a person who is, or was, an APS employee in the NDIS Commission has breached the Code.
 18. After the investigation has concluded and the breach decision-maker has taken the reasonable steps described above, then the breach decision-maker is to determine in writing whether a breach of the Code has occurred.
 19. Appointment as a breach decision-maker under these procedures does not empower the breach decision-maker to make a decision regarding sanction. Only the Commissioner or a person who has been delegated the power under Section 15 of the Act and related powers, such as under section 29 of the Act may make a sanction decision.

Sanctions

Note 1: in relation to SES employees, the NDIS Commissioner is required under section 64 of the *Australian Public Service Commissioner's Directions 2022* to consult with the APSC prior to imposing a sanction.

Note 2: under section 15(1) of the *Public Service Act 1999*, sanctions may only be imposed on current APS employees.

20. The process for imposing a sanction must be consistent with the principles of procedural fairness as outlined in the note to section 13 above.
21. If a determination is made that an APS employee in the NDIS Commission has breached the Code, a sanction may not be imposed on the employee unless the sanction decision-maker has taken reasonable steps to:
 - a. inform the employee of:
 - i. the determination that has been made
 - ii. the sanction or sanctions that are under consideration
 - iii. the factors that are under consideration in determining any sanction to be imposed
 - b. give the employee a reasonable opportunity to make a statement in relation to the sanction or sanctions under consideration.
22. The statement may be a written or oral statement and should be provided by the person within 21 calendar days, or any longer period that is allowed by the sanction decision-maker.

Sanctions which may be imposed

23. The purpose of imposing a sanction is not to punish the employee but to maintain standards of conduct by APS employees. Sanctions are intended to be proportionate to the nature of the breach and provide a clear message to the employee that their behaviour was not acceptable.

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24. A sanction is also a deterrent to others and demonstrates that misconduct is not tolerated by the Commission.
 25. Sanctions which may be imposed are outlined and detailed in subsection 15.1 of the Act.

Record of determination and sanction

26. If a determination is made in relation to a suspected breach of the Code by a person who is, or was, an APS employee in the NDIS Commission, a written record must be made by the breach decision-maker and sanction decision-maker of:
 - a. the suspected breach
 - b. the determination
 - c. any sanctions imposed as an outcome of a determination that the employee has breached the Code
 - d. if a statement of reasons was given to the person regarding the determination in relation to suspected breach of the Code, or, in the case of an employee, regarding the sanction decision, that statement of reasons or those statement of reasons.