Factsheet

Preparing for a misconduct investigation

Preparing for a misconduct investigation includes scoping and planning, formulating allegations, and notifying an employee or former employee that they are the subject of a misconduct investigation.

## Deciding the scope of an investigation

An agency may decide to take misconduct action in circumstances ranging from a single allegation of a specific behaviour to broad concerns about many aspects of a person’s conduct.

Regardless of where a matter falls on this spectrum, a decision will need to be made about what, specifically, the investigation is to consider.

This includes both the particular incidents of alleged misconduct, and the particular elements of the APS Code of Conduct (Code) that may have been breached.

## Drafting allegations

## An ‘allegation’ in a misconduct investigation is a statement to the effect that the agency believes a person to have done a specific thing, at a specific time and place, which on its face appears to be inconsistent with one or more obligations in one or more elements of the Code.

## Allegations need to be capable of being proved or disproved. If a complaint or concern about a person’s behaviour is not capable of being expressed as a testable allegation, agencies should consider ways of managing the issue outside the misconduct framework.

## Allegations presented to the person under investigation in a notice of investigation are an articulation of the scope of the investigation, and of the ‘case against them’ to which the person is expected to respond. They form the basis for the investigation and the framework for the investigation report.

## Investigation plan

## It is good practice to develop an investigation plan at the beginning of the process to articulate what needs to be done to establish the facts.

## Timeliness

The *Australian Public Service Commissioner’s Directions 2022* (the Commissioner’s Directions) stipulate that the process for determining whether a person has breached the Code must be carried out with as little formality and as much expedition as a proper consideration of the matter allows.

This means that the investigation needs to be conducted efficiently—but that this should not come at the expense of a properly conducted process, or of procedural fairness obligations.

## Notice of investigation

Section 59 of the Commissioner’s Directions provides that a person alleged to have breached the Code must be informed of certain matters before a determination is made. Many agencies do this in the form of a written notice of investigation.

A person under investigation should be notified at the earliest reasonable time of the decision to start a misconduct investigation, and of the identities of the person or people involved in investigating the allegations, making the breach determination, and making the sanction decision (if that person has been appointed at this stage).

This allows the person under investigation to raise any concerns about apprehension of bias. Advising the person earlier rather than later can also help to avoid the undesirable risk of the person finding out through unofficial sources that an investigation is underway.

Any notice to the person under investigation must be consistent with the requirements of the agency’s procedures under s.15(3) of the *Public Service Act 1999*, which in turn must be consistent with s.59 of the Commissioner’s Directions.

As a matter of good practice, a notice of investigation generally should set out:

* the specific behaviour the person is alleged to have engaged in
* the element(s) of the Code they are alleged to have breached
* the full range of sanctions that may apply
* who will be investigating the alleged misconduct, if this is different from the decision-maker
* the decision-maker who will make the determination.

Further information can be found in **Chapter 7** of **Handling Misconduct.**