Checklist

Determining a breach of the Code of Conduct

**Initial considerations**

* Have you been properly appointed or otherwise tasked by your agency head or authorised person in line with your agency’s s.15(3) procedures?
* Have you declared any potential conflicts of interest?
* Are you personally satisfied that you will be able to bring an independent and unbiased mind to this inquiry and that a reasonable observer would agree?
	+ If in doubt, you may wish to discuss with your manager, HR area, or the Ethics Advisory Service.
* Have you read your agency’s s.15(3) procedures and relevant guidance material?
* Where relevant, have you familiarised yourself with your agency policy, procedures or guidelines for dealing with fraud?
* Have you decided the scope of the investigation?
* Have you decided how the matter is to be investigated, including whether you will be assisted by an investigator?
	+ If you are being assisted by an investigator, are you will need to maintain appropriate involvement in the investigation, noting that the investigation, findings of fact, and determination of breach are your responsibility as the breach decision-maker.
* If an investigator is used, have they been provided guidance on:
	+ what alleged conduct is to be investigated and which element(s) of the Code may have been breached?
	+ the likely witnesses or where other evidence that may be available?
* Have you made an investigation plan?

**Advice to the person under investigation**

Have you, in line with your agency’s s.15(3) procedures, ensured that the person under investigation has been advised of:

* the specific behaviour they are alleged to have engaged in? That is, have they been provided with clear advice about the nature of the act, or acts, that they are suspected of having done?
	+ If during the investigation it becomes clear that the behaviour they are alleged to have engaged in is different from the behaviour described in the initial notice of investigation, the person should be informed of this and given reasonable opportunity to comment before a determination is made about breach.
* the element(s) of the Code they are alleged to have breached?
	+ If during the investigation it becomes clear that the element(s) of the Code that the person is alleged to have breached are different from those set out in the notice of investigation , the person should be informed of these and given reasonable opportunity to comment before a determination is made about breach.
* the sanctions that may be imposed under s.15(1) of the PS Act?
* if you are being assisted in running the inquiry, the identity of the person who will be providing you that assistance?
* that you will be making the determination?
* how the process is expected to proceed in accordance with the agency’s s.15(3) procedures?
* any relevant guidance material, and sources of advice and support?

**Gathering and evaluating evidence**

* Have you considered the range of sources of evidence that may be available, including electronic records, interviews, written statements, etc.?
* In planning interviews, have you considered the good practice advice in section 8.1.1 of *Handling Misconduct*?
* Have you taken steps to verify the evidence you have collected?
	+ Have witnesses been questioned about evidence that conflicts with their witness statements?
* Have you considered the impact of unconscious bias in your evaluation of the evidence?
* Are you satisfied that you have taken into account all relevant evidence and that there is enough reliable evidence to be able to draw a reasonable conclusion, on the balance of probabilities, as to the facts?

**Procedural fairness**

* Has the person under investigation been given a reasonable opportunity to respond to the evidence, including to new or conflicting evidence that has arisen during the investigation?
* In particular, has the person under investigation been given adequate notice of all material of which you are aware and which is credible, relevant and significant to the proposed breach decision?
	+ This includes any such material which could assist the person in answering the case against them, even though you do not propose to rely on the material in making particular findings or decisions adverse to the person.
* Have you ensured that any explanations, or evidence, provided by the person under investigation or witnesses have been appropriately tested and given proper weight?
* Has the response of the person under investigation been genuinely and fairly considered, and have lines of inquiry suggested by that person been pursued where it is reasonable to do so?
* Where new material has emerged that is relevant, credible, and significant, has the person under investigation been given a reasonable opportunity to respond that material?

**Writing an investigation report**

Does the investigation report:

* outline the nature of the alleged misconduct—that is, the specific actions or behaviours?
* identify relevant legislation and policy material or guidelines or other agency practices you took into account?
* set out the steps taken to collect evidence and information?
* outline the evidence and present it in a balanced way, including both evidence that supports and challenges the allegations
* acknowledge and consider including the person’s response to the allegations and all credible, relevant and significant material, as well as and their response to any new or conflicting evidence that was uncovered in the course of the investigation?
* if there is a conflict in the evidence, explain why one set of evidence is preferred over another

* outline the conclusions or findings on material questions of fact made on the available evidence, including any inconsistencies in the evidence or issues that remain unclear? These conclusions need to flow logically from the evidence that has been collected and considered
* outline all the relevant elements of the Code that were considered and reasons why the action or behaviour did, or did not, amount to a breach of the element or elements of the Code?

**Making a breach determination**

* If another person has conducted the investigation, have you considered the evidence and drawn your own conclusions both on whether the person under investigation has done what they were alleged to have done, and, if so, whether that behaviour amounts to a breach of the Code
* Have you identified any procedural flaws in the investigation that need to be corrected?
* Is there any further evidence that needs to be gathered or tested?
* Is there sufficient credible, relevant, and significant evidence to support a finding of a breach?
* In deciding which elements of the Code have been breached, have you focused on the elements most relevant to the behaviour?

**Preparing a decision record**

* Have you made a written record of your decision?
* Does the decision record comply with the agency’s s.15(3) procedures?
* Does the record include:
	+ a summary of the evidence you took into account in making your decision, and any evidence or established facts that were not taken into account and reasons why you did not consider that evidence relevant
	+ where you have considered a recommendation from an investigator, your response to the recommendation, including reasons for accepting or not accepting the investigator’s recommendation. The investigator’s report could be attached to avoid the need to reproduce the detail of the report in the decision record
	+ your findings of fact, on the balance of probabilities, about what happened—that is, whether the person under investigation engaged in the behaviour alleged
	+ your decision as to whether that behaviour amounts to misconduct, and, if so, which elements of the Code have been breached and why.

**Advising the person under investigation of the decision**

* Have you taken reasonable steps to notify the person under investigation of the breach determination?
	+ It is good practice to provide this information in writing.

Have you, where appropriate:

* enclosed a copy of the breach determination record, and, if appropriate, the investigation report
* for an employee, provided information about the process for making a sanction decision
	+ In some cases it may be appropriate at this stage to advise the employee of the sanctions being considered, and the factors under consideration in determining a sanction
* notified the employee or former employee of the right to seek review of the determination under s.33 of the PS Act.
	+ Both employees and former employees found to have breached the Code have the right to seek review by the MPC of the determination.
	+ Applying for a review will not operate to stay the finding of breach or, in the case of a current employee, consideration of any sanction.
* If the evidence does not support a decision that there has been a breach of the Code, have you informed the person under investigation of your conclusion?

**Next steps**

Regardless of whether a breach was found, has consideration been given to the need for:

* training, coaching, /development, or performance management measures?
* changes to processes or systems?
* steps to address any issues within the work environment arising from the initial complaint—for example, mediation or openly discussing issues of concern within the workplace?
* re-evaluation of workplace norms and culture?
* information to be provided to a complainant about the outcome of the investigation in accordance with agency guidance material and taking into account the requirements of the Privacy Act and the PID Act?

Where it has been determined that an employee has breached the Code:

* Has the case been referred to a sanction decision-maker to determine if a sanction or sanctions are to be imposed?
	+ It is appropriate for the employee found to have breached the Code to be informed of the name of the person who has been given the authority to determine any sanction(s) and what the next steps of the process will involve.