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**REVIEW OF SANCTIONS FOR THE COUNCIL OF ETHICS FOR PUBLIC SERVICE**

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## INTRODUCTION

This working paper discusses the issue of sanctions within the legal and institutional context of the work of the Council of Ethics for the Public Service. It builds on a previous review of the structure, work and capacity of the Council.

## CURRENT CONTEXT AND ISSUES

### 1. THE CURRENT WORK OF THE COUNCIL

The Council of Ethics consists of eleven members elected by the Council of Ministers for a period of four years and a similar number of staff in the Secretariat. The tasks of the Council are:

- to determine whether public officials adhere to the Code of Ethics while performing their duties;
- to investigate claims that the principles of the Code have been violated by a senior public official with a minimum rank of general manager or equivalent<sup>1</sup>;
- to inform the relevant authorities on the results of such investigations;
- to carry out or to commission studies and research which help establish a culture of ethics throughout the public administration.

At present, the capacity of the Council is limited by the resources made available to it. In relation to the implementation of the Code, the Council currently is able to handle the small number of allegations that fall within the scope of the Code (from about 150 received); approximately 60 a year covering: personnel issues; breaches of official duty; misuse of public resources; plagiarism; nepotism; fairness; access to information; corruption and denial of equity.

Allegations are reviewed as to the rank of the public official involved and the nature of the possible offence. Allegations which may involve a criminal element must be redirected to the Prosecutors Office while those relating to lower-level public officials are sent to the institution concerned (and a report later received). Allegations which fall within the remit of the Code are agreed by the Council for investigation which, at present, involves a request for information from the institution concerned and a decision by the Council on whether or not a breach of the Code and whether or not the sole sanction should be imposed. To date, no sanction has been imposed.

The law under which the Council works is relatively broad, giving the Council two main roles – determination of a Code and investigation of any breaches (for which it has powers to access witnesses, documents and other information), and wider reviews of ethical environments.

The law takes a very broad view of ethics, covering not only public duty/private interests breaches but also discrimination and maladministration breaches.

The law provides for only one sanction for proven breaches although it does provide the right of appeal. Under Article 39 the Regulation states:

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<sup>1</sup> See the list in Appendix 2 of the Code of Ethics. Complaints on other categories of officials received by the Ethic Council are forwarded to the disciplinary authority of the respective institution without further investigation by the Council.

In case that the Council determines that the public official who has performed the subject, process or action subjected to application against the ethical principles, this occasion should be announced to public by Prime Ministry via Official Gazette as a decision of the Council. Nevertheless if the decision of the Council would be cancelled by judiciary then it implements this judicial decision and has it published on the Official Gazette.

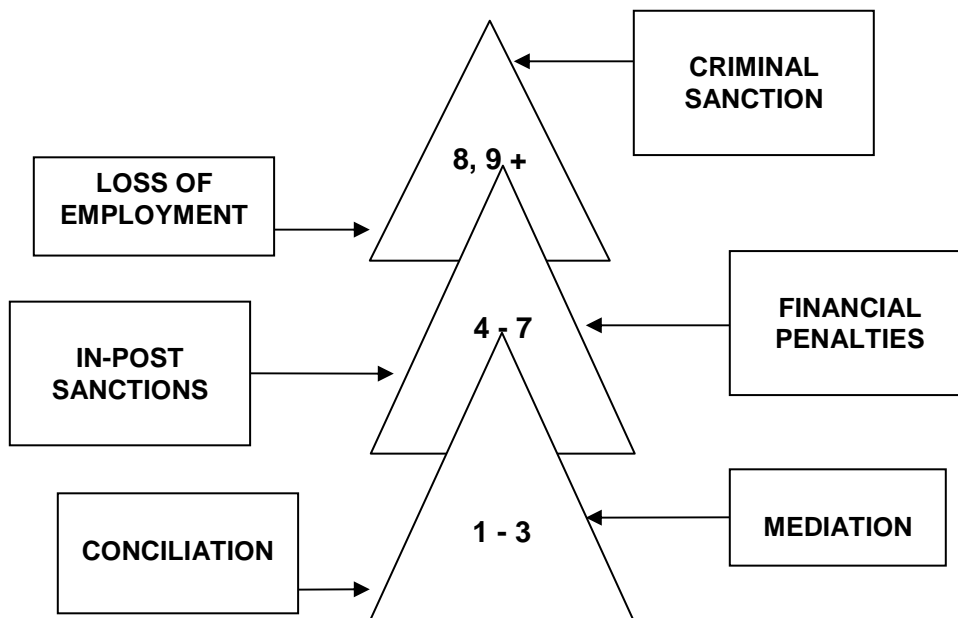
The Council has been aware of the limiting nature of the sanction, including:

- The decision may bear no relation to the breach;
- Senior public officials concerned about public reputation are more likely to challenge such a decision;
- The decision may have no impact on the public official's career in a ministry;
- There is no requirement that a ministry take any action against the public official.

It is clear that much of the effectiveness of the Council, as well as its reputation, is limited by the **single sanction**

### A RANGE OF SANCTIONS

Sanctions must work to a hierarchy as follows:



The point of a hierarchy is that there a range of sanctions, applied according to the rank of the public official and the circumstances of the breach of the Regulation. If a complaint is upheld, then the following sanctions could be available:

<b>LEVEL OF SANCTIONS</b>	<b>CONDITIONS</b>	<b>REASON FOR SANCTION</b>
<b>1. Conciliation</b>	<i>Attend ethics training course; apologise to complainant</i>	Minor breach often by an inexperienced or junior official. Breach a mistake or accident, easily corrected. Little or no effect on public. Needs training.
<b>2. Mediation: verbal warning</b>	<i>Up to 2 warnings before written warning issued</i>	Minor breach due to lack of care or inexperience or being to undertake duties without appropriate experience or training. Warning from line manager with some supervision to confirm improvement. Needs training. Continuing breaches may require job training, or re-location or new duties or greater supervision.
<b>3. Mediation: Written warning</b>	<i>Written warning added to Personnel file</i>	More serious breach caused by carelessness or incompetence. May involve a degree of intent. More likely to involve a more senior official or demonstrate conduct likely to continue because of inability or unwillingness to accept guidance or supervision. Written warning indicates both seriousness and the intention of the institution to take a further lapse very seriously
<b>4.required relocation to new post</b>	<i>Once to a new ministry</i>	Breaches are likely to occur more than once and are cause by lack of experience, inability to perform duties satisfactorily, potential for more serious breaches or areas of temptation, possible negative influence from colleagues, unwillingness to accept supervision.
<b>5. Suspension with pay</b>	<i>From one week to one month</i>	Serious breach of Regulation affecting member of the public. Awareness of unethical conduct.
<b>6. Downgrading</b>	<i>At least one grade</i>	Serious breach of Regulation affecting member of the public. Awareness of unethical conduct despite ethics training. Some evidence of intent. Reluctance to admit breach.
<b>7. Fine</b>	<i>Between one week and one month's salary</i>	Serious breach of Regulation affecting a member of the public. Awareness of unethical conduct despite ethics training. Evidence of intent. Reluctance to admit breach/cover-up of actions.
<b>8. Dismissal</b>		Serious breach of Regulation affecting member of the public and a senior official. Likely to involve conflict-of-interest or nepotism. Sanctions applied previously. Clear evidence of intent and pre-planning. Refusal to admit breach. Deliberate efforts to cover-up actions.
<b>9. Dismissal; ban on re-employment in any</b>		Serious breach of Regulation affecting member of the public. Sanctions applied previously. Clear evidence of intent and pre-

<b>public office</b>		planning. Refusal to admit breach. Deliberate efforts to cover-up actions. Strong likelihood to continue to act in same manner.
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A parallel sanction attached to any sanction 1. – 9. above should be the confiscation of any payment, gift or the value of any hospitality or benefit-in-kind where no criminal charges have been brought.

### NUMBER OF OFFENCES

An official in breach of the Regulation should not assume that the same sanction may be applied for any repeat of the same breach. Nor should they assume that the sanctions are sequential. There must be a limit to the number of times a sanction may be applied for the same breach. Any sanction may be applied depending on the seriousness of the offence, the seniority of the official and the aggravating/mitigating circumstances.

<b>LEVEL SANCTIONS</b>	<b>OF</b>	<b>CONDITIONS</b>	<b>NUMBER OF TIMES A PUBLIC OFFICIAL MAY RECEIVE THE SAME SENTENCE FOR THE SAME OFFENCE</b>
<b>1. Mediation</b>		<i>attend ethics training course; apologise to complainant</i>	<i>up to 2 mediation interventions</i>
<b>2. Verbal warning</b>		<i>Up to 2 warnings before written warning issued</i>	<i>Up to 2 verbal warnings</i>
<b>3. Written warning</b>		<i>Written warning added to Personnel file</i>	<i>Up to 1 written warning</i>
<b>4. required relocation to new post</b>		<i>Once to a new ministry</i>	<i>one occasion only</i>
<b>5. Suspension with pay</b>		<i>From one week to one month</i>	<i>one occasion only</i>
<b>6. Downgrading</b>		<i>At least one grade</i>	<i>one occasion only</i>
<b>7. Fine</b>		<i>Between one week and one month's salary</i>	<i>one occasion only</i>
<b>8. Dismissal</b>			
<b>9. Dismissal; ban on re-employment in any public office</b>			

### WHO WILL APPLY THE SANCTIONS

If a complaint is upheld, then the following sanctions should be available. The proposal assumes that Ethics Commissions become involved in the investigation of minor breaches of the Regulation

on the request of the Council of Ethics for Public Service and the Council would only be involved in applying sanctions for serious breaches of the Regulation.

In terms of which sanctions could be appropriate to the Council's Terms of Reference, it would be expected that the Council would select those sanctions that can be incorporated into law.

Sanctions 1. and 2. are essentially the responsibility of ministries and line managers and the Council may in any case transfer responsibility for dealing with minor allegations to ministries. Sanctions 1. and 2. are essentially employment issues and may well be best handled by the official's line manager. Sanctions 3. – 5. are also matters for ministries but require a more formal approach in that they will impact on a public official's terms and conditions of service. Thus ministry disciplinary boards should be involved to ensure that the sanction is seen as a formal punishment and is imposed. The remaining sanctions are much more serious and should be retained for the more serious breaches – see Aggravating and Mitigating circumstance below – and only applied by the Council of Ethics for Public Service.

<b>LEVEL OF SANCTIONS</b>	<b>CONDITIONS</b>	<b>RESPONSIBILITY FOR APPLYING SANCTION</b>
<b>1. Mediation</b>	<i>Attend ethics training course; apologise to complainant</i>	Line Manager in consultation with Ethics Commission
<b>2. Verbal warning</b>	<i>Up to 2 warnings before written warning issued</i>	Line Manager in consultation with Ethics Commission
<b>3. Written warning</b>	<i>Written warning added to Personnel file</i>	Disciplinary Board in consultation with Ethics Commission
<b>4. Required relocation to new post</b>		Disciplinary Board in consultation with Ethics Commission
<b>5. Downgrading</b>	<i>At least one grade</i>	Disciplinary Board in consultation with Council of Ethics for Public Service
<b>6. Suspension with or without pay</b>	<i>From one week to one month</i>	Council of Ethics for Public Service
<b>7. Fine</b>	<i>Between one week and one month's salary</i>	Council of Ethics for Public Service
<b>8. Dismissal</b>		Council of Ethics for Public Service
<b>9. Dismissal; ban on re-employment in any public office</b>		Council of Ethics for Public Service

One related issue is the announcement of the sanction. From sanction 3. on, and given the right of appeal, the sanction will be notified in writing to the offender and recorded on their personnel file. If the Council becomes involved in investigations – see section on Related Issues below – then it is to be expected that digests or summaries of cases where breaches were proved will be published on the Council's website. In a number of other countries, sanctions against a public official, if an employment or disciplinary matter rather than a criminal matter, will be placed on the website and anonymised. On the other hand, sanctions 8. and 9. are so significant that, so long as all appeals procedures are completed, publication by name should be considered for publicity and deterrence purposes.

## **AGGRAVATING AND MITIGATING CIRCUMSTANCES**

In determining sanctions all the circumstances of the breach will be taken into account. A minor breach by a senior public official may well attract a different sanction than if committed by an inexperienced junior official. Admission of a breach that does not therefore require a full inquiry may attract a different sanction than a breach where the offender does everything to obstruct an inquiry.

Depending on the adjudication procedures, those involved in adjudication within ministries and by the Council, may wish to consider the following factors in determining sanctions:

### **1. Aggravation**

- Whether the breach was deliberate, dishonest or reckless.
- Duration and frequency of the breach.
- The amount of any benefit gained.
- Whether the breach reveals serious or systemic circumventing of the management systems or internal controls.
- The extent to which the breach departs from the required standard.
- The impact of the breach, including whether public confidence has been damaged.
- The loss or risk of loss caused to the public.
- The nature and extent of any corruption or other criminal offences facilitated or otherwise attributable to the breach.
- Whether there are a number of smaller issues, which individually may not justify a sanction, but which do so when taken collectively.
- Whether the offender has received ethics training.
- Whether the offender was the lead person involved, or took a secondary role.
- The seniority and degree of trust reposed in the offender.
- The period over which the breach(es) occurred.
- The effect on the complainant directly.
- The effect on the offender's fellow employees or colleagues.
- Evidence of pre-planning.
- Whether the offender tried to obstruct the inquiry, conceal documents, threaten witnesses, and so on
- The offender's history in terms of previous breaches.

### **2. Mitigation**

- How quickly, effectively and completely did the offender accept responsibility for his or her actions, and apologies to the complainant.
- The level of appointment or experience of the offender.
- The degree of co-operation with the Council or other agency provided during the examination of the breach.
- The likelihood that the same type of breach being committed again by the offender if no sanction is imposed.
- Willingness to accept proposed sanction.

## RELATED ISSUES

The sanctions policy cannot be considered without consideration of wider issues. These include:

- Who will investigate breaches – this will require consideration of the possible transfer or delegation of cases to ethics commissions, disciplinary boards or inspectorates in ministries.
- Who will investigate breaches within the Council of Ethics – sanctions 3. onward will attract formal sanctions that will affect public officials' careers. This will mean that public officials are likely to seek to defend themselves at any disciplinary or adjudication proceedings. The evidence – including interviews and collection of documentation - on behalf of the Council will therefore need to be undertaken according to good practice procedures, properly obtained, recorded, stored and corroborated. These issues are discussed in the **Complaints: guide to possible inquiry procedures** report which describes procedures that are intended to ensure, as far as possible, that all complaints and all investigations are undertaken in accordance with fair and transparent guidelines and intended to produce a fair and transparent outcome. Such inquiries should be conducted by investigators appropriately trained.
- Adjudication procedures – another good practice issue is ensuring that the investigator is not the adjudicator. If the Council is to conduct inquiries then it will need to introduce procedures to separate the Council's investigation and adjudication functions, as well as ensure that the procedures are fair, independence and transparent. This will involve questions of membership, decision criteria, who presents the evidence, right of legal representation, and so on.
- A related issue is that of appeals. Any appeal to a court will reinforce the issue of the quality and credibility of the evidence, and the conduct of the investigator. It will also involve the proper conduct of the adjudication process. There needs to be a clear and agreed appeals procedure established that also address similar issues to those raised in relation to the adjudication procedures.

A number of these issues have already been addressed in earlier working papers, and may need to be re-considered in the light of the working paper on the possible establishment of an Office of Public Standards through the merger of the Council for Ethics of Public Service and a proposed Ombudsman.

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