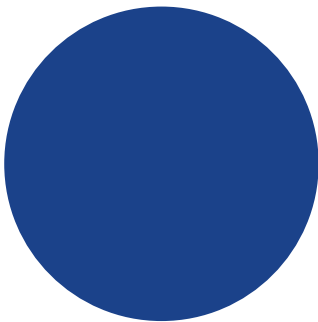


Code of Conduct Discussion Paper



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Foreword

The Department of Education is reviewing its Code of Conduct (Code).

The department wants to ensure that the Code:

- reflects recent business and regulatory changes
- aligns with its values and principles including Strategic Plan 2018-2022
- aligns with the NSW Public Service Commission's Code of Ethics and Conduct
- is in keeping with professional and community standards of conduct.

This discussion paper was developed as part of the review process to provide background about the purpose of the Code and outline a number of issues that have been identified by stakeholders. It is not intended to be a comprehensive guide of the areas covered by the Code.

The discussion paper is broken into three key areas:

- **Background** - a brief commentary on key issues
- **Options for Change**- possible solutions in relation to the Code and key issues
- **Questions for Consideration** – an invitation to provide comments about the various topic areas or issues.

The department is keen to receive feedback from individuals and groups who have an interest in improving the Code. This feedback will help shape the revised document.

Purpose of the Code

The Code links the department's values and principles with expected standards of professional conduct. It intersects with many of the department's policies and procedures and provides a broad framework for the requirements contained within these documents.

The Code seeks to be a universal document that applies across a wide range of settings, contexts and employment relationships. It does not offer an exhaustive list of standards, as such a document would risk being oppressive.

The Code describes appropriate standards of conduct rather than prescribing or prohibiting conduct. It provides a framework for individuals, workplace managers and work units to support their day to day decision making and management of employee conduct.

Employees are expected to live up to both the spirit and content of the Code.

The Code is a solid reference point for principals and workplace managers seeking to define the department's workplace culture, raise standards of employee behaviour and take appropriate action in relation to conduct concerns.

Code format

Background

There are diverging views about the format and style of a Code. The options vary between:

- a brief principle driven document
- detailed guidance which grapples with specific contextual issues.

The department's Code currently sits at the more detailed end of the spectrum. The Code currently includes: a statement of ethics, key employee responsibilities and 21 specific areas of conduct. The Code also contains case examples, hyperlinks to key policies and legislation.

Some sample Codes from other NSW Government agencies are:

- [NSW Fire and Rescue](#)
- [NSW Health](#)
- [NSW Ombudsman](#)
- [NSW Police Force](#)

Options for change

While the Code could be radically shortened, it is likely that many employees would consider such guidance inadequate.

The [NSW Police Force](#) use a model which separates components of the agency's Code into three parts. This includes a:

- one-page Code of Conduct and Ethics which lists ten core employee responsibilities
- Standards of Professional Conduct Booklet which provides greater guidance on the ten core employee responsibilities
- statement of values.

One benefit of this approach is that it provides information about the expected standard of conduct for employees in a quick and easy to read format.

Questions for consideration

1. Is the Code an effective document in its current format? What could be improved?

Social media

Background

In 2015, when the last Code was drafted, 57% of the Australian population had a social media account.ⁱ This number has grown to 71% in 2020.ⁱⁱ

In line with this growth, teachers, students and parents are increasingly using digital technologies for professional and personal purposes.

The department recognises the value of social media in education. Such tools are a vibrant, flexible and an increasingly effective way to engage, educate and communicate with students, parents and school communities.

Personal views

The department supports employee's choice to engage online and participate in public and political debate. However, employees must ensure their use of social media does not conflict with their obligations to the department and the public service.

The High Court of Australia matter of [Comcare v. Banerji \(2019\)](#) in broad terms found that an employer could take action against an employee using an anonymous twitter handle to criticise the government of the day's policies and the department they worked for. The High Court found this did not impugn the implied freedom of political communication. The employer could uphold requirements that upheld its values and reputation.

Whether an employee is using social media in a personal or professional capacity, there are key standards which should be upheld. These include:

- comments must be ethical, appropriate and not place at risk their own professional reputation or the department's reputation
- comments must not disparage, denigrate or cause harm to others
- comments and profiles must avoid any perception that they are using their position or expressing views on behalf of the department without permission to do so.
Employee should not identify themselves as public school teachers or department staff when expressing personal views.

Appropriate use

The Code references use of social media as 'appropriate use of electronic communication and social networking sites.' It focuses on ensuring that employees exercise good judgement and ethical behaviour, engage with students only for educational purposes and not use the department's networks to access inappropriate material. The Code also

requires that employees comply with the department's [Social Media Policy](#) and [Communication Devices and Associated Services Guidelines](#).

The [Child Safe Standards](#) require that organisations have robust systems to manage interactions between employees and children.

Social media environments can encourage informal communication. This creates substantial risks for educators and students. Skill and care are required when using social media platforms with students which can be prone to bullying and inappropriate conduct when poorly managed.

The department's Social Media Policy has a strong focus on protecting student's privacy and maintaining professional boundaries.

Options for change

Options for change would be that the Code:

- clarify employees' individual responsibility for content they publish in a personal capacity via social media
- encourage employees with workplace concerns to seek resolution by engaging the department using existing channels
- reflect recent changes made to the department's Social Media Policy but not attempt to replicate or replace it
- include specific guidance in relation to what constitutes appropriate use of electronic communication (particularly as it relates to interactions with students), social media and social networking
- specify that workplace managers should not approve the use of electronic communication which is ephemeral or cannot be transparently monitored
- reflect the department's expectation that educators using social media address poor behaviour or inappropriate conduct as they would in a classroom setting. This includes communicating during usual school hours, addressing poor student behaviour and not engaging in personal discussions with students.

Question for consideration

2. Where should the department set standards in respect to recognising an employee's choice to engage with social media but ensuring the reputation of the department and public sector?
3. How can the Code be strengthened to maintain professional boundaries?

Reportable conduct

Background

On 1 March 2020, the reportable conduct scheme for child protection (the scheme) transferred to the NSW Office of the Children's Guardian (OCG) under the *Children's Guardian Act 2019* (the Act).

The scheme monitors how organisations including the department, investigate and report on types of allegations made against employees, volunteers or certain contractors working with children.

Under the Act, employers must have systems, processes and policies in place (including a Code) regarding preventing, identifying, reporting and handling reportable conduct matters.

Conduct which is reportable under the legislation is: a sexual offence, sexual misconduct, ill treatment, neglect, assault offence under s43B or 316A of the *Crimes Act 1900 No 40 (NSW)* and behaviour that causes significant emotional or psychological harm to a child.

Under the Act, the definition for sexual misconduct was narrowed. As a consequence, crossing of professional boundaries only amounts to sexual misconduct where there is a sexual element. This narrowing has the potential to create a gap which does not address the precursors to more serious conduct because a sexual element is absent.

Professional boundaries acknowledge the power imbalance between employees and students and sets parameters within which this relationship should operate. The erosion of professional boundaries leaves students vulnerable to harm. The department has a responsibility to safeguard students by providing clear professional boundaries which employees must uphold.

Concerns have been raised about grooming as defined by the Crimes Act 1900. At present, the offence of grooming only applies to victims under the age of 16 years. It has been suggested that students over the age of 16 years remain vulnerable to grooming without recourse.

It has been suggested that the Code lacks clarity about whether it is inappropriate for an employee to form a relationship with a student, irrespective of location or school setting.

Options for change

An option for change in relation to these issues includes amending the Code to ensure that it:

- reflects the department's obligations under the scheme and as a 'child safe organisation' as defined by the OCG's child safe standards
- reinforces the significance of employees maintaining professional boundaries with students
- highlights special care offences and grooming offences and clearly identifies that conduct of this nature against any student under 17 years of age is sexual misconduct
- explicitly reflects community and departmental expectations that employees of the department not engage in intimate or sexual relationships with any student, irrespective of their location or school setting.

One of the department's primary goals is to ensure that 'every student is known, valued and care for in our schools'. Amendment to the Code as suggested would arguably demonstrate the department's commitment to the protection of students. It would also empower the department to take disciplinary action against employees found to have engaged in inappropriate and/or grooming behaviour.

Questions for consideration

4. What issues, risks or guidance should the Code provide in respect to professional boundaries?

Intimate relationships with former students

Background

All education systems across Australia except NSW have developed policy and procedures about intimate relationships between adults where a staff-student relationship once existed. An intimate relationship may include:

- physical intimacy
- sexual intimacy
- emotional / romantic Intimacy.

Queensland and the ACT classify the teacher-student relationship as fiduciary in nature. Queensland's Department of Education and Training states that 'a fiduciary relationship exists where, as a result of one person's relationship to another, the former is bound to exercise rights and powers in good faith and for the benefit of the latterⁱⁱⁱ. The onus is placed on the employee to demonstrate that the power imbalance has dissipated and provides a duty to disclose to supervisors where an intimate relationship may commence.

Guidance material in all jurisdictions except NSW explicitly refer to the significant power imbalance between teachers and students. They also state that such an imbalance does not necessarily cease after the student has left school.

Most guidance material warns teachers that they cannot assume they will be protected from disciplinary action by claiming a relationship began after the student left school. Time is only one factor that may be considered by regulatory authorities.

The Teachers Registration Board of Tasmania states that 'teachers should be wary of entering such a relationship with any young adult who was formerly a student of theirs, particularly in the early years after the cessation of the teacher-student relationship.'^{iv}

The Australian Psychological Society (APS) Code of Ethics prohibits psychologists from engaging 'in sexual activity with a former client, or anybody who is closely related to one of their former clients, within two years after terminating the professional relationship with the former client.'

It is suggested that the Code reflect best practice in relation to Child Safe Standards and meets community standards. Such changes would be in addition to existing standards of conduct with respect to children and young people under 18 years of age.

Options for change

Options for change would be that the Code:

- reflects the fiduciary nature of school-based employee/student relationships
- provides clear guidance to school-based employees about identifying when an intimate relationship with a former student is an abuse of their position of power.

Questions for consideration

5. What principles could be applied to fairly determine whether a power imbalance in an intimate relationship with a former student is an abuse of power?
6. What factors should be considered to fairly determine if relationship with a former student is an abuse of power? (For example: period of time, the nature of the relationship, the nature of prior contact)
7. Should teachers involved in intimate relationships with former students bear the onus for establishing that the relationship only started after the student left school?

Directions

Background

It is a goal of the department that every student, every teacher, every leader and every school improve every year. Constant disruptions in the workplace caused by employee misconduct can negatively impact schools and potentially impede the realisation of this goal.

It is well established law that employees must follow reasonable and lawful directions of their employers. Employees receive payment for their work. In turn, employers are entitled to direct how employees undertake their work, provided it is reasonable and lawful.

An employee's refusal to comply with a lawful and reasonable direction undermines the employment relationship and provides a basis for disciplinary action.

A direction is one of the many tools available to a workplace manager dealing with employee conduct and performance. When used correctly, directions can be effective in distilling for an employee exactly what is required of them and the consequences should they fail to comply.

In 2013, the department sought to address this issue with the release of the 'Fair warnings for minor, repeated misconduct' memorandum.

The process, which became known as 'Fair Warning, Fair Action' (FWFA), was developed to support managers and principals to address poor employee conduct in the workplace.

FWFA was intended to be a fair process for both managers and employees.

Under FWFA, a framework existed where low-level poor conduct was managed by the employer issuing the employee with a letter of expectation and subsequently, two directions before referring the matter to the department's Employee Performance and Conduct Directorate (EPAC) for possible disciplinary action.

There has been a growing sentiment that the FWFA process is not working for workplace managers/principals, employees or EPAC investigators:

- Principals and workplace managers report finding the process to be technical, slow and that it can result in an escalation in the conduct before action can be taken
- Employees report at times that the process for issuing directions has been unfair with limited options for review.

- EPAC investigators report that the quality of evidence can be poor because of delays and that the workplace relationships are irreparably fractured by the time matters are investigated.

A simple process for issuing and acting against breaches is required.

Options for change

FWFA could be retired and the Code could be revised to:

- explicitly state the department's expectation that employees comply with all reasonable and lawful directions
- incorporate an employee's right to seek a review of a direction
- outline a fair process for issuing directions
- provide clarity around the authority of workplace managers to issue directions and refer related breaches to EPAC for possible disciplinary action
- provide a pathway for the immediate consideration of a breach of direction for investigation.

These changes would be in concert with improved resources for principals, workplace managers and employees in taking direct management action and issuing directions.

Questions for consideration

8. Should the Code discontinue the current FWFA process?
9. Should the Code adopt a simplified approach to issuing and responding to breaches of directions?

Bullying and harassment

Background

In accordance with Safe Work Australia, the department defines workplace bullying as ‘repeated and unreasonable behaviour directed towards a worker or group of workers that creates a risk to health and safety.’

Workplace bullying can be physically and emotionally damaging to victims and witnesses. It can also negatively impact the workplace and result in direct and indirect costs related to high staff turnover and absenteeism, workers compensation and lost productivity.^v

The department does not tolerate bullying and harassment. It is committed to a workplace that affords its employees dignity and respect as defined by the Dignity and Respect in the Workplace Charter.

In 2016, the Public Service Commission (PSC) issued sector wide guidance about preventing, identifying and responding to workplace bullying titled: [Positive and Productive Workplaces: Respect Reflect. Reset.](#)

In 2019, 34% of department employees reported witnessing bullying at work. 18% of employees reported that they had been subject to bullying at work and 77% of this cohort identified a department employee as the source of the bullying.^{vi}

It has been suggested that the term ‘bullying’ is often poorly understood and misused in circumstances where a workplace manager is seeking to address conduct or performance concerns. Bullying is used by some employees to amplify objections to reasonable actions of workplace managers.

It is important that the Code differentiates between a workplace manager’s legitimate authority at work and bullying. All employers have a legal right to direct and control how work is done, and managers have a responsibility to monitor workflow, give feedback and manage performance.

The current Code references bullying and harassment and refers to various policies and guidance material including:

- NSW Public Service Commission – Behaving Ethically: A guide for NSW government section employees
- Premier’s Memo 2007-02: Dignity and Respect: Policy and Guidelines on Preventing and Managing Workplace Bullying
- Dignity and Respect in the Workplace Charter
- Anti-Racism Policy.

Options for change

The department has focussed significant attention on bullying and harassment in recent years and a number of resources have been developed including the Staff Complaint Procedure, Staff Complaints Toolkit and Health and Safety bullying resources.

The Code should complement current departmental and PSC policies and procedures rather than attempt to replicate, replace or remedy such material or any gaps.

An option for change would be to revise the Code to include advice about the framework that defines bullying and high-level principles in how it should be approached.

The Code may also be amended to:

- explicitly call out bullying as inappropriate and not tolerated by the department
- provide links to key tools including the [Bullying Assessment Tool](#)
- provide a clear definition of bullying that aligns with current policy
- explicitly identify that bullying does not include workplace managers' legal right to direct and control how work is done, and responsibility to monitor workflow, give feedback and manage performance
- require proactive action to be taken by workplace managers to identify and address bullying
- support all parties engaged in processes aimed at clarifying and addressing bullying
- consider the broader performance of individuals engaged in bullying in terms of collegial relationships, people management and leadership
- direct people to resources and policies about bullying.

Questions for consideration

10. Do the suggested options strike a balance between the legitimate rights of workplace managers and the prevention of bullying?

Accurate recording and reporting

Background

Employees are required to report certain types of incidents and conduct. Being truthful, honest and speaking up about incidents in a workplace is critical to properly addressing matters.

For employees, the benefits of early and truthful reporting of mistakes and incidents include:

- standing by the department's values of accountability and integrity
- reduced stress
- increased likelihood of being part of a teachable moment and potentially, improvements to the department systems and / or processes.

For the department, a strong internal reporting system is beneficial to:

- reputation
- systems and processes
- resources
- the accuracy of any investigations or reviews conducted as a result of a mistake or incident.

Effective internal reporting systems signal to employees and the public the department's commitment to integrity and improvement. Such systems enable and support employees to speak up, fostering a culture of trust and responsiveness. They can also protect the department against liability, loss and reputational harm.

While the current Code requires employees to be honest and to also report certain types of matters, it does not clearly make the link that employees should approach reporting with candour and not mislead through untruths or omissions.

Options for change

The Code could:

- explicitly state the department's expectation that employees truthfully and candidly provide information
- encourage employees to report to supervisors / workplace managers where they have made mistakes or been involved in an incident.

Questions for consideration

11. Should the Code explicitly require employees to be candid and truthful when reporting information.

Flexible working

Background

According to the PSC:

Flexible working is about rethinking the where, when and how your work can be done, in a way that maintains or improves service delivery for the people of NSW.

It does not mean every role, or every individual, can or should (or has to) work flexibly but what it does mean is that everyone can begin a conversation about what type of flexible working is available to them, regardless of the reason they are seeking it.

The PSC's flexible working policy commitment applies to all employees of the NSW government sector and is governed by each agencies rules and relevant awards.

All agencies, including the department, had a responsibility to implement the flexible working policy commitment by 2019.

Ultimately, flexible working should be:

- for everyone – everyone is able to request the types of flexibility that make sense within their roles but what it looks like will vary depending on the role
- mutually beneficial – flexible working will be successful when it creates the best outcomes for employees, employers and customers
- about the team – flexible arrangements must have a team overview about how work will be distributed and solve for the needs of team members, including what is fair and equitable for that team
- give and take - flexibility requires give and take between the employee, manager and team
- leader led – employees will take up flexible work when they see their leaders building flexible working into their own lives and across their organisation
- contextual – agencies need to develop strategies based on their role types, operating contexts and industrial arrangements.

The COVID-19 pandemic has led to more corporate employees working from home for an extended period of time. During this time, employees and the department have had to adapt quickly to new ways of working.

Options for change

The Code does not reference flexible work.

A suggestion has been made that the Code reflect the responsibilities of employees when working flexibly. This includes:

- ensuring that flexible work accords with the framework and departmental policy
- ensuring flexible work is planned and documented
- ensuring safe work practices
- securing confidential information
- looking after departmental property
- ensuring a mutual benefit which maintains or improves service levels.

Question for consideration

12. Should flexible work be a specific focus area within the Code? If so, what should be covered in this section?

Managing organisational risk

Background

In the course of EPAC's investigation work common themes are identified which have led to an employee's integrity being brought into question. Conflict of interest, gifts and financial management are matters that frequently arise in investigations.

Employee's hold positions of trust and administer public resources. This can create actual or perceived risks for employees and the department which must be appropriately managed.

While the Code currently provides general guidance about these issues, there may be benefit in providing more specific guidance in areas which have arisen in the course of our investigation work.

There are key requirements for an employee to undertake their role. Failing to undertake mandatory training and/or hold required credentials for a position can create organisational risk. Strengthening the Code to encourage ongoing professional learning and mandate essential credentials and mandatory training could be beneficial.

Options for change

An option for change is to include more specific or revised guidance in the Code about:

- managing a conflict of interest plan: a workplace manager or supervisor developing plans to manage a declared conflict of interest must do so in writing and in a manner which upholds the integrity of the department and public trust, prevents the impression of improper influence and is in the public interest.
- maintaining financial controls: an employee must not circumvent financial controls or mechanisms in place to ensure accountability associated with the use of public funds.
- using public funds: drawing from the [PSC Code of Conduct](#), employees should be required to use public resources in an ethical, efficient, effective and prudent way. Employees should also be warned against using public resources, money, property, equipment or consumables for personal benefit or an unauthorised purpose. In addition, employees receiving, spending or accounting for money must ensure they know, understand and comply with the requirements of the *Public Finance and Audit Act 1983*, the *Public Works and Procurement Act 1912* and the *Government Advertising Act 2011*.
- managing conflicts arising from purchases which directly benefit you: an employee should not approve their own purchases even if within their delegation. This

includes purchases related to equipping their own office, p-card expenses or travel claims.

- managing gifts, benefits and hospitality: special care should be taken to ensure that gifts are managed in line with the Gifts, Benefits and Hospitality Policy and Procedure. Particular attention should be given to cumulative gift giving where multiple low value gifts are provided and shared gift giving where multiple donors provide a gift with a value greater than \$50.
- mandatory training and accreditation: employees should engage in ongoing learning to update and develop professional skills. Employees must maintain the required credentials to fulfil their role including clearances, accreditation and mandatory training as required by law and / or department policy.

Question for consideration

13. What gaps or further strengthening to the Code should occur to reduce organisational risk and maintain the integrity of employees and the department?

ⁱ Hootsuite & We Are Social (2015), “*Digital 2015: Australia Global Digital Overview*,” retrieved from <https://datareportal.com/reports/digital-2015-australia>

ⁱⁱ Hootsuite & We Are Social (2020), “*Digital 2020: Australia*,” retrieved from <https://datareportal.com/reports/digital-2020-australia>

ⁱⁱⁱ QLD Department of Education and Training *Standard of Practice* February 2016

^{iv} Teachers Registration Board Tasmania *Professional Boundaries: Guidelines for Tasmanian Teachers* (2019)

^v Safe Work Australia (2016), “*Guide for preventing and responding to workplace bullying*” retrieved from <https://www.safeworkaustralia.gov.au/system/files/documents/1702/guide-preventing-responding-workplace-bullying.pdf>

^{vi} Department of Education (2019), “*People Matter 2019 NSW Public Sector Employee Survey: Cluster Report - Education*,” retrieved from https://my.education.nsw.gov.au/human-resources/media/documents/human-resources-strategies/employee-engagement/pmes-folder/2019-documents/2019-high-level-pdf-reports/2019_NA0000_C_Education.pdf