

MANAGEMENT OF CONDUCT RELATED TO NON-COMPLIANCE WITH COVID-19 VACCINATION REQUIREMENTS GUIDELINES

Implementation document for the Management of Conduct and Performance policy

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1 Context

These guidelines outline the process and responsibility for handling, investigation and disciplinary decision-making about conduct that is not compliant with the department's COVID-19 vaccination requirements, Public Health Orders, industrial determinations and any directions for implementing these ([section 2.3](#)).

The guidelines apply to permanent employees employed under the Teaching Service Act 1980 and the Education (School Administrative and Support Staff) Act 1987 ([section 2.2](#)).

From 18 October 2021, in accordance with its [COVID-19 Vaccination Guidelines](#), the department requires full vaccination against COVID-19 for all staff working on government school sites operating under Level 3 plus settings. The Education Public Health Order, signed by the Minister for Health and Medical Research, also requires any worker (including volunteers) to be fully vaccinated before working on any school site from 8 November 2021.

The Secretary has made determinations under the [Teaching Service Act 1980](#) and the [Education \(School Administrative and Support Staff\) Act 1987](#) that, as a condition of employment, staff are required to either:

- provide the department with vaccination evidence
- a compliant medical contraindication certificate by 18 October 2021 where they are supporting a staged return of student cohorts.

Attestation and supporting evidence must be supplied by 8 November 2021 for all other staff who attend a department school for their work.

The department has a responsibility to deal appropriately and expeditiously with the small number of employees whose conduct is non-compliant with its COVID-19 Vaccination Guidelines, determinations and directions.

These guidelines set out a consistent framework for providing procedural fairness, as well as a timely investigation process to address misconduct arising from non-compliance with the COVID-19 Vaccination Guidelines. The objects of the Acts together with the legislative scheme ([section 2.1](#)) underpin this framework.

The paramount consideration in these matters is the protection of children, ensuring a safe environment for students, staff and visitors at all times.

Discipline processes must be applied consistently without bias and each case should be considered upon its merits with particular attention to the unique circumstances surrounding the COVID-19 pandemic, related Public Health Orders, determinations and directions issued by delegated officers.

2 Application of provisions

2.1 Legislative scheme

These guidelines for managing conduct related to non-compliance with COVID-19 vaccination requirements operate in addition to the [Guidelines for the Management of Conduct and Performance \(PDF 1509.6 KB\)](#), which are specified under:

- Section 93D [Teaching Service Act 1980](#)
- Section 30 [Education \(School Administrative and Support Staff\) Act 1987](#).

Allegations of misconduct against non-compliant departmental officers employed under the [Government Sector Employment Act 2013](#) will be dealt with using the processes outlined in this Act.

2.2 Application of these guidelines

The provisions within these guidelines for dealing with misconduct apply generally to:

- officers (permanent employees) employed by the department under the Teaching Service Act
- persons permanently employed under the Education (School Administrative and Support Staff) Act.

They **do not** apply to:

- public service staff employed under the Government Sector Employment Act 2013
- persons employed on a probationary, temporary or casual basis, whose employment is managed by other instruments.

2.3 Application of existing policies

The guidelines are applied in conjunction with the relevant:

- [COVID-19 Vaccination Guidelines](#), Public Health Orders – any order made by the Minister for Health and Medical Research under section 7 of the Public Health Act 2010 that applies to department employees
- industrial determinations
- directions given to implement the COVID-19 Vaccination Guidelines and Public Health Orders.

2.4 Non-compliant COVID-19 conduct

Non-compliance with the Public Health Order, applicable determinations and directions for COVID-19 vaccination amounts to misconduct. These guidelines only apply to handling, investigating and disciplinary decision-making associated with non-compliant COVID-19 conduct. This includes an employee failing to verify their vaccination status within the COVID-19 Vaccination Attestation and Confirmation System (VACS) prior to 8 November 2021.

Table 1 Definitions of compliant and non-compliant COVID-19 conduct

Term	Definition
Compliant COVID-19 conduct	An employee has either: <ul style="list-style-type: none">• had two doses of a COVID-19 vaccine and registered their vaccination status on VACS*• provided a compliant medical contraindication form uploaded to VACS*.
Non-compliant COVID-19 conduct	An employee has: <ul style="list-style-type: none">• not completed the self-declaration in VACS* by 8 November 2021• declared they are not vaccinated as at 8 November 2021• declared they are medically exempt as at 8 November 2021, but failed to provide a medical exemption or the medical exemption is not compliant with the Public Health Orders and related guidelines.

*VACS – Vaccination Attestation and Confirmation System

3 Definitions

Table 2 Definitions relating to handling of misconduct related to non-compliant COVID-19 conduct

Term	Definition
The Acts	References the <u>Teaching Service Act</u> and the <u>Education (School Administrative and Support Staff) Act</u> .
COVID-19 Vaccination Attestation and Confirmation System (VACS)	A system for employees to record their vaccination compliance. All employees are required to make their declaration prior to 8 November 2021.
Decision maker	The officer/s delegated by the Secretary to make certain decisions about remedial or disciplinary actions.
Delegated officer	The officer/s delegated by the Secretary to undertake certain actions.
Disciplinary Advisory Panel	A panel convened by a decision maker, which is constituted and has terms of reference set out in the <u>Disciplinary Advisory Panel – Terms of Reference</u> . This document does not form part of these guidelines.
Department	Unless otherwise specified, means the Department of Education.
Detrimental action	Action causing, comprising or involving any of the following: <ul style="list-style-type: none"> • injury, loss or damage • intimidation or harassment • discrimination, disadvantage or adverse treatment in relation to employment • dismissal from, or prejudice in, employment • disciplinary proceedings.
Employee	Relates to a permanently employed officer or employee under the Acts. See <u>section 2.2</u> .
Medical exemption	Employees who have accepted medical contraindication circumstances after 8 November 2021 through providing a <u>Medical Contraindication Certificate</u> in a form approved by the Chief Health Officer, signed by their treating physician and submitted on the VACS.
Public Health Orders	Any order made by the Minister for Health and Medical Research under section 7 of the Public Health Act 2010 that applies to department employees.
Unauthorised absence	An unauthorised absence is applied where an employee is non-compliant with the COVID-19 vaccination requirements and is unable or unwilling to take other forms of leave. An unauthorised absence is unpaid and does not accrue leave of service entitlements.
Secretary	The Secretary of the NSW Department of Education.
Workplace manager	The person with responsibility for managing a particular workplace, including principals or directors.

4 Principles underpinning the guidelines

4.1 Objects of the Acts

The protection of children is the paramount consideration:

- in taking any action with respect to an employee or temporary employee under the Acts
- in dealing with any appeal against or determining any claim with respect to that action.

This paramount consideration responds to the department's duty of care towards children who attend schools and the communities' expectation that students are cared for in a safe environment at all times.

Courts and tribunals are required to give paramount consideration to the protection of children when dealing with an appeal against any relevant disciplinary action or any claim made about such action.

These guidelines uphold the objects of the Acts to:

- maintain appropriate standards of conduct for officers in the teaching service, as well as school administrative and support staff
- protect and enhance the integrity and reputation of the respective employee groups
- ensure that the public interest is protected.

4.2 Safety and public health

The guidelines provide a specific process to address the requirements of the Minister for Health and Medical Research's Public Health Orders. Section 7 of the Public Health Act 2010 applies to department employees and ensures staff and community safety.

4.3 Timeliness

It is in the interests of all parties for any disciplinary process to be resolved in a timely and expeditious manner. These guidelines balance the interests of the employee with procedural fairness and a streamlined approach achieving a fair outcome.

Although efforts are made to ensure a timely investigation, other factors can impact on timeliness. These include, but are not limited to, the:

- complexity of the issues
- need to seek external or internal expert advice
- impact of delay on the fairness of the process, or matters arising from the process such as the suspension of the officer
- employee's health or wellbeing.

4.4 Procedural fairness

Procedural fairness is a legal safeguard applying to an individual whose rights or interests are, or could be, affected.

An employee who receives allegations of misconduct should have access to these guidelines.

Fundamental tenets of procedural fairness include that a person be advised of the matter against them, have an opportunity to respond to the matter and have their response considered by the investigator or decision-maker. This rule is reflected in section 93D and 93F of the Teaching Service Act, and section 30 and 32 of the Education (School Administrative and Support Staff) Act.

The procedural guidelines ensure that an employee who is the subject of an allegation of misconduct concerns must be:

- advised in writing of the alleged misconduct and that the matter may lead to disciplinary action
- given an opportunity to respond to an allegation of misconduct
- provided with an opportunity to respond to the proposed disciplinary action prior to a final decision being reached.

Procedural fairness also encompasses processes such as:

- making reasonable enquiries or investigations before taking disciplinary action
- ensuring that the investigator and/or decision maker have no direct interest and are unbiased.

The Acts specifically exclude undertaking a formal hearing with legal representation, or calling or cross-examining witnesses when taking disciplinary action (see section 93E of the Teaching Service Act and section 31 of the Education (School Administrative and Support Staff) Act).

4.5 Support person

An employee can be assisted through the investigation process by a support person of their choosing, including a union or legal representative.

If the investigator or decision maker has reason to believe that the employee does not have the capacity to speak effectively or to understand the implications of a process, the investigator must inform the employee they can find an appropriate support person, contact their union and/or seek legal advice. Where requested, a translator may also be provided.

4.6 Legal advice

All parties can access legal advice throughout the investigative and disciplinary process. This includes the employee subject to the allegations, the investigator and the decision maker.

4.7 Deciding each matter on its merits and taking appropriate action

Disciplinary and remedial processes must be applied consistently, each matter must be treated on its individual merits and the result in action relevant to the individual matter. Irrelevant considerations must be disregarded.

The general approach taken in relation to breaches of direction related to the implementation of Public Health Orders or departmental [COVID-19 Vaccination Guidelines](#) involving the same or similar conduct may be considered collectively, however thorough consideration must also be given to any individual submission made by the employee.

The Acts provide an indicative range of options for remedial action and a prescribed range of disciplinary options. If the decision is that the employee has been non-compliant in relation to COVID-19 conduct, their employment will be terminated unless there are exceptional mitigating circumstances.

In the absence of other relevant information or mitigating circumstances, the department considers cessation of employment to be the appropriate disciplinary action in most circumstances. This is because:

- the purpose of the requirement/direction is to protect the health and safety of students, teachers and broader community
- the consequences for non-compliance were clearly communicated to the employee in a variety of correspondence
- the determinations for employees to provide vaccination evidence or a medical contraindication certificate is a condition of employment for those employed under the Teaching Service Act and the Education (School Administration and Support Staff) Act.

4.8 Disciplinary Advisory Panel

The Disciplinary Advisory Panel is convened by the decision maker to provide advice on proposed disciplinary action. It will be consulted about the range of matters involving non-compliant COVID-19 conduct and will provide advice about an appropriate disciplinary action that may be applied in specific circumstances.

The decision maker/s will take advice from the panel but are not bound by the advice when determining the appropriate disciplinary and/or remedial action.

Before taking disciplinary action, the decision maker may, at their discretion, remit a cohort or single matter back to the panel for its consideration and advice based on further employee-provided information.

4.9 Communication

The department will notify an employee under investigation via their departmental email account, their last known address and any private email address the department has on record.

An employee may provide the department with the contact details of a legal or union representative for future communication.

5 Procedures for dealing with misconduct

5.1 Overview

The Secretary has the responsibility for dealing with alleged employee misconduct. The Secretary has delegated this function to particular decision makers who understand the disciplinary process and have the resources available to undertake the delegated function.

The process for dealing with alleged misconduct by an employee who is non-compliant with COVID-19 requirements is set out in this section. Once an employee has been identified as not being compliant (section 5.1.2), the department will notify the employee about the allegation of non-compliance, the disciplinary process will commence and risk management will be implemented (section 5.1.3) with the safety of students being the paramount consideration.

The department will determine an appropriate course of action (section 5.2.1), begin the investigation process (section 5.2.2) and make a final determination on the matter (section 5.3.3).

At any time before the final disciplinary decision is made, a person can decide to comply with the department's COVID-19 Vaccination Guidelines and provide the appropriate confirmation.

5.1.1 Timeframes

The process for addressing misconduct needs to be timely and expeditious.

As a guide only, uncomplicated matters should generally be concluded within 3 months from when the Secretary receives the initial allegation.

Some matters will take longer to finalise for a range of reasons (see section 4.3) but officers and permanent employees should be advised of the allegations as soon as practicable.

Delays will be documented and monitored.

5.1.2 Defining misconduct and COVID-19 non-compliance

Misconduct is defined in the Acts as:

- a contravention of any provision of the respective Acts or regulations
- engaging in, or having engaged in, any conduct that justifies taking disciplinary action, for example conduct contrary to the Code of Conduct and/or other established department policies
- taking any detrimental action (within the meaning of the Public Interest Disclosures Act 1994) against a person that is substantially in reprisal for the person making a public interest disclosure within the meaning of that Act
- taking any action against a person that is substantially in reprisal for an internal disclosure made by that person
- misconduct may relate to an incident or conduct that happened either
 - while the employee concerned was not on duty
 - before the employee was appointed to their position.

The term misconduct applies to many different factual situations but usually involves deliberate acts. It could relate to an isolated or specific event or a pattern of conduct over time.

When considering whether conduct constitutes misconduct, consideration must be given to the objects of the Acts as set out in section 4.1.

Non-compliance with COVID-19 Vaccination Guidelines amounts to misconduct.

Employees are required to enter their vaccination status on the COVID-19 Vaccination and Attestation Confirmation System (VACS) by 8 November 2021.

VACS will allow principals to view employees who have completed their vaccination record before 8 November 2021.

An employee is not compliant when they have:

- not completed the self-declaration in VACS by 8 November 2021
- declared they are not vaccinated as at 8 November 2021
- declared they are medically exempt as at 8 November 2021 but have failed to provide a medical exemption or the medical exemption is not compliant with the Public Health Orders and related guidelines.

Non-compliance with COVID-19 Vaccination Guidelines amounts to misconduct.

5.1.3 Risk management and removal from duty during an investigation

Risk management strategies will be employed to manage risk to all parties in an investigation.

The paramount consideration in removing an employee from duty during an investigation is the protection of students. In line with Premier's Memorandum M1994-35 Suspension of Public Employees from Duty, decisions will be made considering the factual, contextual and management concerns including the:

- nature of the allegations, and including the strength of the evidence implicating the officer
- nature and location of the current duties
- public interest
- efficient operation of the department.

It is not feasible from a risk management perspective for the employee to remain on duty while under investigation. The following options will be applied in order:

- The employee can apply for accrued extended leave, long service leave, or leave without pay for a limited time, up to the commencement of the disciplinary action. Approval will be conditional on the employee being contactable and available to respond to the investigative process.
- If the employee has not applied for leave while non-compliant with the COVID-19 Vaccination Guidelines, the employee will be marked as being an unauthorised absence.
- The employee will be placed on suspension without pay.

5.1.3.1 Suspension with or without pay

Working from home arrangements, alternative duties and paid suspension are generally not considered an appropriate risk management strategy for non-compliant employees. In line with the Premier's Memorandum, Suspension of Public Employees from Duty, the COVID-19 pandemic creates exceptional circumstances that can only be practically and safely managed by suspending the employee without pay.

An employee suspended without pay will be provided with reasons for the decision.

Suspensions with or without pay will be reviewed at least every 30 days.

An employee suspended without pay will accrue salary during the period of suspension. During the suspension period, the salary is withheld.

Any salary withheld under these provisions will be forfeited to the state unless the Secretary otherwise directs, or the salary was due to the employee in respect to a period before the suspension was imposed.

The position of a suspended employee will not be permanently filled while they are on suspension or alternative duties.

If further information is received, during an investigation, which materially changes the risks, the risk management action will be reconsidered.

5.2 Investigation and disciplinary process

There are 3 stages for dealing with an allegation of misconduct:

Stage 1: Determining an appropriate course of action when dealing with an allegation of misconduct.

Stage 2: Investigation, if it is determined that an investigative response is required.

Stage 3: Determining an appropriate outcome. This could involve dismissal of the allegation/s, no further action, or disciplinary action.

Appendix 1 sets out the high-level steps in the investigation and disciplinary process.

5.2.1 Stage 1 – Determining an appropriate course of action

5.2.1.1 Assessing the allegation or incident

The Acts allow the Secretary, through a delegated officer, to deal with the allegation of misconduct as a disciplinary matter in accordance with these guidelines.

5.2.1.2 Advising the employee

The delegated officer must advise the affected employee at the earliest opportunity, in writing, they are the subject of a non-compliance with COVID-19 Vaccination Guidelines allegation. The employee must be advised of the intended action at this time.

If it is decided to treat the allegation as a disciplinary matter, the employee is to be advised in writing of the intention to investigate.

Where the entire allegation can be put to the employee at the outset, the advice must accord with section 5.2.2.4 (Allegations must be put to the employee with the opportunity to respond).

However, where further information gathering is required, the written advice to the employee at the outset must:

- provide as much detail as possible about the nature of the allegations
- invite the employee to make a written submission (to be provided within 14 days) and provide supporting documentation relevant to the alleged conduct.

An employee will be advised they are not required to make a submission at this time. However, should they choose to do so, the employee's written submission, to be provided within 14 days, will be considered as part of the investigation, including whether the investigation should proceed and avenues of enquiry.

The department will notify an employee subject to investigation and/or disciplinary action for breaches of direction related to implementing Public Health Orders, the determinations or departmental COVID-19 Vaccination Guidelines, via their departmental email account, their last known address and any private email address the department has on record.

At any point during the disciplinary action, the employee can remedy the conduct and return to their paid employment by complying with the COVID-19 Vaccination Guidelines and satisfying the requirements of the operating Public Health Order.

5.2.2 Stage 2 – The investigation

The department will investigate the issues fully before making any final decision in relation to the allegation. This includes considering the employee's submissions and evidence.

An investigation will also include continuation of an internal investigation where external authorities have completed any relevant investigation.

There are common procedural requirements for investigating allegations of misconduct. These are outlined below.

5.2.2.1 The investigation will be conducted by an appropriate investigator

A person inducted in these guidelines is suitably experienced and qualified to investigate breaches of direction related to the COVID-19 Vaccination Guidelines associated directions and determinations.

5.2.2.2 The investigation will be conducted confidentially

Confidential information obtained during the investigation will not be disclosed except for the purpose of the investigation, any action arising from the investigation or where there is a lawful basis for sharing/reporting information. This is to protect the integrity of the process and to preserve the privacy of the parties concerned.

Similarly, all witnesses, including the employee who is the subject of the investigation and their support person, will be advised they should maintain confidentiality and not discuss the matter except for the purposes of the investigation, obtaining legal advice/union support or in relation to their personal health or support needs.

5.2.2.3 The absence of the employee does not preclude investigation

The investigation may be completed without the response of the employee if:

- the employee failed to or decided not to provide a written response
- there are no reasonable mitigating circumstances for the employee to have failed to provide a written response
- reasonable efforts have been made to advise the employee of the allegations, including emailing the employee at their departmental email address.

5.2.2.4 Allegations must be put to the employee with the opportunity to respond

In addition to the advice provided in line with [section 5.2.1.2](#) (Advising the employee), the employee will be provided with complete allegations for their response. Where appropriate for the efficient management of the investigation, an employee may be provided with the complete allegations simultaneously with the investigation advice. Employees need to respond within 14 days.

The allegations must contain sufficient detail to allow the employee to respond fairly and accurately. The employee should also be advised that the allegation, if proven, may result in disciplinary action.

A person under investigation for breaches of direction related to the implementation of Public Health Orders or departmental [COVID-19 Vaccination Guidelines](#) may submit a written response. Requests for submissions by interview by electronic means will be assessed on a case-by-case basis.

Applications for an extension of time will be considered, if reasonable, having regard to the overall circumstances. Decisions will balance the need to ensure fairness with the need to progress the matter.

If no response is forthcoming or if the employee states they do not intend to respond, the investigator will make no inference about whether the allegations have been denied or admitted.

5.2.2.5 Collection of additional evidence

Other sources of evidence may be sought and may include, but are not limited to:

- documentary evidence such as photographs, emails and workplace records
- expert evidence such as technical and forensic evidence
- material from other agencies provided under information sharing arrangements.

5.2.2.6 Allegations of victimisation or harassment

An employee must not discuss the investigation or their evidence with potential witnesses without first seeking the agreement of the investigator, as it may contaminate the investigation process. Engaging in such conduct would breach these guidelines and amount to misconduct.

An employee is entitled to advise the investigator of witnesses they believe have relevant evidence for the investigation to consider but should not directly approach a witness during an investigation.

If a witness informs the investigator they are being victimised or harassed by the employee who is the subject of an investigation, the investigator will seek evidence in relation to the alleged victimisation and/or harassment. Such information may result in further allegations being put to the employee.

5.2.2.7 Preparing the investigation report

The investigator examines the evidence and analyses any submission received from the employee.

The investigator will prepare a standard investigation report with employee particulars that:

- consolidates all the material gathered during the investigation process
- details the allegations involving the employee
- outlines the investigation process followed
- provides a factual analysis of the evidence
- provides the investigator's view on the relevant facts as to whether, on the balance of the probabilities, the employee has engaged in the alleged misconduct, referring to material on which the view is based
- sets out the investigation recommendations
- has all relevant attachments, such as correspondence with the employee, disciplinary and other interviews and witness statements.

The investigation is not required to analyse the merits or otherwise of:

- medical evidence related to vaccinations
- the authority of the relevant minister to make Public Health Orders
- the authority of the department in implementing Public Health Orders.

5.2.2.8 Finalising the investigation without further action

At any point during the disciplinary action, the employee can remedy the conduct and return to their paid employment by complying with the COVID-19 Vaccination Guidelines and satisfying the requirements of the operating Public Health Order.

If the investigator is satisfied, at any time, that the facts do not support the allegation of misconduct, or the employee provides evidence of vaccination or otherwise complies with the COVID-19 Vaccinations Guidelines the investigation will be discontinued and a recommendation to either take remedial action or no further action be taken.

The delegated officer can either:

- endorse the recommendation and consider any remedial action that may be appropriate
- remit the matter back for further investigation.

Where the investigation is discontinued, the employee will be paid their salary from the date their conduct is compliant with the COVID-19 requirements and they recommence work. Any salary withheld or unpaid will be forfeited to the state unless the Secretary directs otherwise.

5.2.3 Stage 3 – Determination about appropriate outcome by decision maker

5.2.3.1 Decision maker may request further information

The decision maker may seek specialist advice (including departmental and legal) or make further enquiries, including requesting further investigation of certain matters before forming an opinion.

If it is necessary to put further allegations to the employee, the processes for putting allegations and allowing an employee to respond must be followed (section 5.2.2.4).

The decision maker may decide to convene the Disciplinary Advisory Panel (section 4.8) for consultation and to provide advice about an appropriate disciplinary action that may be applied in specific circumstances.

5.2.3.2 Onus and standard of proof

The department has the onus of proving that the employee has engaged in misconduct. The decision maker must be satisfied on the balance of probabilities, based on the relevant facts, that the employee has engaged in misconduct.

For a decision maker to be satisfied that an allegation of misconduct is proven, it is not necessary that each of the particulars of that allegation be made out as a matter of fact. It is open to the decision maker to find that the person has engaged in misconduct even where the decision maker has found that one or more, but not every one of the particulars of the allegation have been found proven.

In relation to an allegation of misconduct where the possible findings against an employee or the consequences for that employee are serious (they may result in the demotion, a direction to resign or the dismissal of the employee) the decision maker should ensure that the employee is 'reasonably satisfied' that the allegation of misconduct has been established (see Briginshaw v Briginshaw (1938) 60 CLR 336 at 362):

reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequences of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

In reaching a decision, the decision maker is not required to analyse the merits or otherwise of:

- medical evidence related to vaccinations
- the authority of the relevant minister to make Public Health Orders
- the authority of the department in implementing Public Health Orders.

If the decision maker has formed the view that the person has engaged in misconduct, then consideration must be given to appropriate action that should follow.

5.2.3.3 Where misconduct is not found

The decision maker may determine the facts do not support the allegation of misconduct. In this case, the decision maker may determine that misconduct is not sustained and will advise the employee, and the complainant and other parties (where appropriate).

The materials in relation to the matter including the investigation report will be removed from any records or files held as to the individual employee (personnel files). Such records will be retained in accordance with the State Records Act 1998. All records of disciplinary investigations are retained by Professional and Ethical Standards under restricted access.

Remedial action may still be taken by a decision maker despite misconduct not being found.

5.2.3.4 Where misconduct is proven

If the decision maker finds the employee has engaged in misconduct, they may exercise discretion in making a determination about what action to take. In determining the appropriate course of action, the decision maker will not adopt a policy that a particular conduct will always attract the same action but will consider the factors outlined in section 4.7 (Deciding each matter on its merits and taking appropriate action). They may seek advice from specialists (departmental and legal) before making a determination.

A decision maker is not obliged to impose disciplinary action on an employee who has been found to have engaged in misconduct.

If the decision maker determines that misconduct has occurred, they may decide to:

- take no further action
- take remedial action
- take disciplinary action against the employee, such as cessation of employment (unless there are extenuating circumstances).

5.2.3.5 Information to be considered following a finding that misconduct is proven

The decision maker and/or disciplinary advisory panel will consider the following information to determine what action should be taken following proven misconduct:

- the facts of the case
- [section 4.7](#), Deciding each matter on its merits and taking appropriate action
- the impact of the conduct on the objects of the Acts (see [section 4.1](#))
- it is a condition of employment for those employed under the Teaching Service Act and Education (School Administrative and Support Staff) Act who attend a departmental school for their work to provide the department with either a vaccination evidence, or a compliant medical contraindication certificate by 8 November 2021
- the purpose of the requirement/direction to protect the health and safety of teachers, students and other persons
- the impracticality of any lesser sanction, and the difficulties it would create where employees are unable to carry out relevant work on or after 8 November 2021 without having had 2 doses of a COVID-19 vaccine, or been issued with a medical contraindication certificate, in accordance with the Education and Care Workers Public Health Order
- for managing the workforce
- whether policies and guidelines applicable to the conduct were in place, were known and were being followed
- the consequences for non-compliance were clearly communicated to the employee in various correspondence
- mitigating or extenuating circumstances
 - any personal circumstances of the employee and whether these may have contributed to any misconduct for example health issues, particular stressors on the employee
 - the effect of the proposed action on the employee.

Matters outside the investigation report and supporting documentation – such as employment records, monitoring programs and previous misconduct – may also be taken into account when deciding whether disciplinary action is appropriate and what action should be taken.

5.2.3.6 Proposing disciplinary action

In normal circumstances, a decision maker is not limited to a single course of action and may take a type of disciplinary action in combination with other disciplinary or remedial action.

Where a decision maker is of the opinion that the kind of disciplinary action that should be taken is outside the decision maker's delegation, it should be referred to an appropriate decision maker with delegation to impose more serious disciplinary action.

Consideration of disciplinary action related to breaches of direction related to the implementation of Public Health Orders or departmental COVID-19 response plans should take into account the principles outlined at [section 5.2.3.5](#).

5.2.3.7 Misconduct proven – disciplinary action advice to employee

If the decision maker has determined that, on the balance of the probabilities, an employee has engaged in misconduct and that disciplinary action may be appropriate, they must notify the employee in writing of the decision and the proposed disciplinary action.

The written notification must include:

- the details of the misconduct that the decision maker is of the opinion the employee has engaged in
- the full investigation report with all supporting attachments, subject to any legislative or confidentiality requirements, including public interest disclosure considerations
- an outline of the disciplinary action that the decision maker proposes to impose, including the severest disciplinary action that is being considered for the particular matter
- advice that any previous employment matters, such as past remedial action or discipline matters or previous satisfactory work history, may be taken into account
- advice that the employee may request within 7 days an interview with the final decision maker and/or provide a written submission within 14 days.

5.2.3.8 Notifying the employee – submissions prior to disciplinary action

Before taking disciplinary action, the decision maker must have invited the employee and/or their union and/or their legal representative to make a submission and/or participate in an interview. This information, if provided, must be considered before a final decision is made. Requests for submissions by interview by electronic means will be assessed on a case-by-case basis.

The employee and/or union and/or legal representative has 14 days from the receipt of the written notice of the proposed disciplinary action to make a submission. This should include any additional information they consider should be considered in relation to the disciplinary action being proposed.

The decision maker can extend the period for providing a response, having regard to the overall circumstances and the need to ensure procedural fairness, if the employee applies for additional time and provides reasonable grounds for seeking the extension.

5.2.4 Taking disciplinary action

In deciding on disciplinary action, the decision maker must consider all the material before them, including the content of any further submissions from the employee.

The decision maker is not precluded from taking lower level disciplinary action, remedial action or no action.

A record of the finding of misconduct and any disciplinary action taken will be noted on the employee's personnel file.

The employee will be advised in writing of the final decision on disciplinary action and if applicable, the date from which the decision becomes effective.

5.3 Rights of appeal

There is no internal right of appeal of a decision on disciplinary action. However, the employee may be able to seek appropriate external review. This may include an application to the Industrial Relations Commission, or other appropriate body.

5.4 Employee resignation

The Acts provide that a reference to a resignation, is a reference to a resignation that has been accepted by the Secretary/delegated officer.

If an employee seeks to resign or medically retire before completing any disciplinary process, the delegated officer may:

- refuse to accept the resignation or medical retirement
- accept the resignation but continue the investigation dependent on a number of factors
- discontinue the investigation.

Taking disciplinary action does not affect the former employee's retirement or resignation or the relevant benefits and liabilities.

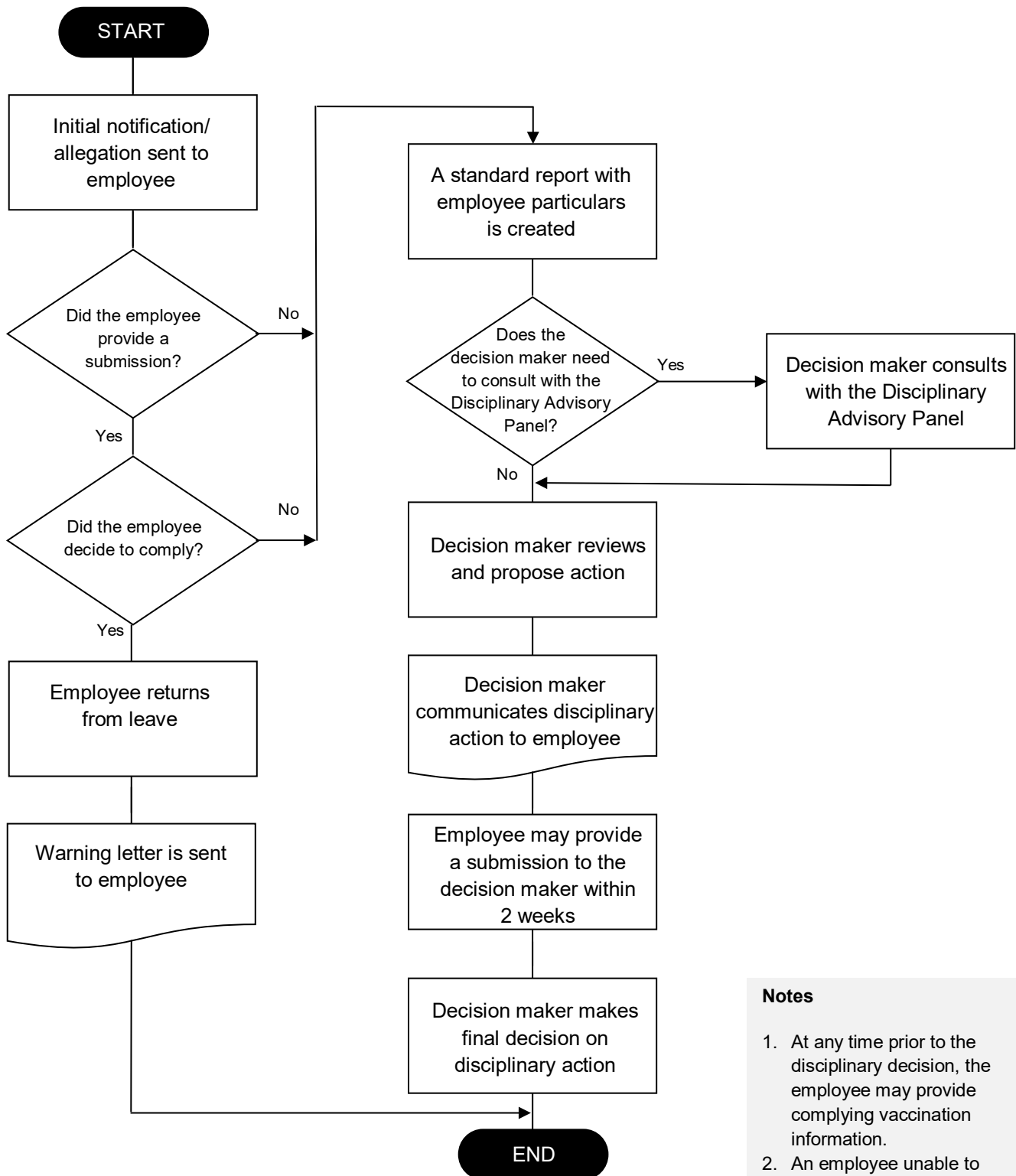
Other than in the most exceptional of circumstances, where an employee seeks to immediately resign and the allegations relate only to non-compliant COVID-19 conduct, the preferable and appropriate approach is to allow the employee to resign and discontinue the investigation.

In exceptional circumstances, including due to compassionate grounds, an employee subject to allegations of non-compliant COVID-19 conduct may be allowed to resign and be granted paid or a reasonable period of unpaid leave up to the date of separation. Any separation of this nature would be conditional on:

- the submission of leave up to the date of separation
- the submission of a request to resign/retire
- the leave submission and separation being irrevocable by the employee.

Appendix 1 – The disciplinary process

The investigation and disciplinary process set out in [section 5.2](#) is outlined in the flow chart below.



Notes

1. At any time prior to the disciplinary decision, the employee may provide complying vaccination information.
2. An employee unable to participate in an investigation because of health and safety issues will be referred to the Health and Safety directorate for appropriate management. The employee may not return to work until the investigation is complete.