



Guidelines for the Management of Conduct and Performance

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1. LEGISLATIVE SCHEME

These guidelines for the Management of Conduct and Performance are the 'guidelines' specified under:

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

2. APPLICATION OF PROVISIONS

2.1 Procedures relating to misconduct and performance

The provisions for dealing with misconduct and performance apply generally to:

- officers (i.e., permanent employees) who are employed by the Department of Education under the [Teaching Service Act](#)
- persons who are permanently employed under the [Education \(School Administrative and Support Staff\) Act](#).

They **do not** apply to:

- public service staff who are employed under the [Government Sector Employment Act 2013](#)
- persons who are employed on a probationary, temporary or casual basis.

2.2 Procedures relating to serious criminal offences

The provisions for dealing with serious criminal offences apply to all persons employed under the legislation set out in [section 2.1](#) above. They also apply to temporary employees employed under the legislation.

2.3 Procedures relating to Charged Persons and Unauthorised Persons

The provisions for dealing with Charged Persons and Unauthorised Persons (see [Dictionary](#)) apply to all persons employed under the legislation set out in [section 2.1](#) above. They also apply to temporary employees employed under the legislation.

2.4 Application of existing policies

The guidelines must be applied following the correct application of the procedures below, where relevant:

- [Responding to Allegations Against Employees in the Area of Child Protection \(PDF 384 KB\)](#)
- [Complaint Handling Policy](#)
- [School Community and Consumer Complaints Procedures \(PDF 489 KB\)](#)
- [Teacher Improvement Program \(PDF 3.3 MB\)](#)
- [Executive Improvement Program \(PDF 4.5 MB\)](#)
- [Principal Improvement Program \(PDF 3.1 MB\)](#)
- [Procedures for Managing School Based Non-Teaching Staff Identified as Having Performance Difficulties \(PDF 98 KB\)](#).

If there is inconsistency between the guidelines and the above procedures, subject to the requirement that the protection of children is to be given paramount consideration, and to any other statutory requirement contained in the procedures, the guidelines will prevail over the procedures.

3. PURPOSE AND OPERATION

3.1 Policy Statement

The Department of Education has responsibility to deal appropriately and expediently with the small number of employees whose conduct or work performance is not of a satisfactory standard.

The objects of the Acts together with the legislative scheme and these guidelines set out a consistent framework which accords with the rules of procedural fairness. The paramount consideration in all conduct and performance matters is the protection of children, ensuring a safe environment for students at all times.

Workplace managers are responsible for managing conduct and performance issues of employees in a fair, timely and transparent manner.

Workplace managers should take direct management action in response to lower-level misconduct where investigation is not warranted. Measures may include but are not limited to; providing guidance/advice, mentoring, addressing a complaint, training and providing a written direction.

Before a performance improvement program is commenced, a workplace manager must ensure performance concerns have been communicated and clarified with the employee, followed by the provision of support to address the identified concerns.

Discipline or performance review processes must be applied consistently without bias and each case should be considered upon its merits. Investigations and performance processes must be conducted in a fair, transparent and timely manner. The approach taken will depend on the nature and seriousness of the issue. Each matter will be assessed and a considered decision will be made about whether to take remedial or disciplinary action.

The Acts provide an indicative range of options for remedial action and a prescribed range of disciplinary options.

The Acts and guidelines also deal with employees or temporary employees who are charged with, or found guilty of serious offences.

The Acts provide for the immediate dismissal of persons who become 'Unauthorised Persons' as a result of being found guilty of specified criminal offences or following the cancellation of a person's Working With Children Check (WWCC) clearance.

4. OBJECTS AND PRINCIPLES UNDERPINNING THE GUIDELINES

4.1 Objects of the Acts

The protection of children is to be 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.

The objects of the legislative scheme for the management of conduct and performance are:

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

4.2 Timeliness

A disciplinary or remedial process should be taken without delay. It is in the interests of all parties for the matter to be resolved in a timely and expeditious manner.

In some cases where other agencies are involved, internal investigative and disciplinary processes may be delayed. For example, delay may occur where another external investigating body, such as the NSW Police Force, the Department of Communities and Justice, Office of the Children's Guardian, NSW Ombudsman or the Independent Commission Against Corruption, has requested that the department's process be deferred while it carries out an investigation.

Other matters that may impact on timeliness include the:

- complexity of the issues
- number of witnesses/parties involved
- 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
- health or wellbeing of the employee or witness.

4.3 Procedural fairness

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

An employee should be made aware of these guidelines and advised on how to access a copy.

A fundamental rule of procedural fairness is 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/s of misconduct or unsatisfactory performance concerns must be:

- advised in writing of the alleged misconduct and that the matter may lead to disciplinary action being taken
- given an opportunity to respond to an allegation of misconduct
- given an opportunity to respond to the decision maker that their performance is still unsatisfactory following an improvement program
- 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 prior to taking disciplinary action
- ensuring a person has been given a reasonable opportunity to improve

- ensuring that the investigator and/or decision maker have no direct interest and are unbiased in the matter.

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

4.4 Deciding each matter on its merits

While disciplinary and remedial processes must be applied in a consistent manner, each matter must be treated on its individual merits and the form of action relevant to the individual matter. Irrelevant considerations must be disregarded.

This means that the same misconduct, unsatisfactory performance or serious offence conviction (unless it gives rise to a person being barred from engaging in child-related work) will not necessarily lead to the same disciplinary action or remedial action being imposed. The circumstances of each case may be different. The relevance of the matter to the employee's position and duties may differ.

4.5 Support person

An employee can be assisted through the performance and investigation process by a support person of their choosing. The support person can attend meetings and interviews with the employee.

The support person may be a representative of the employee's union, a colleague, an adult family member or a legal representative.

The employee should give notice of their support person prior to the commencement of the meeting or interview.

The support person's presence is a safeguard against unfair practices. They act as a witness or adviser to the employee and must not act as an advocate during meetings and interviews.

The support person can be a legal representative, but during meetings and interviews they fulfil the role of a support person and not a legal advocate. They are not permitted to advocate, answer on behalf of the employee or cross-examine the person conducting the meeting or interview.

The nominated support person must not be a witness in the investigation, be involved in the investigation/performance process, or contribute to an unreasonable delay in the investigation/performance process by being unavailable. The support person must be an adult.

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, they can suggest that an employee find an appropriate support person, contact their respective union and/or seek legal advice.

5. DICTIONARY

The Acts mean the [Teaching Service Act](#) and the [Education \(School Administrative and Support Staff\) Act](#).

Charged person is defined in the Acts and means a person whose WWCC clearance is cancelled pending determination of proceedings against the person for an offence specified in Schedule 2 to the [Child Protection \(Working with Children\) Act 2012](#).

Decision maker means the officer/s delegated by the Secretary to make certain decisions about remedial or disciplinary actions.

Delegated officer means the officer/s delegated by the Secretary to undertake certain actions.

The department unless otherwise specified, means the Department of Education.

Detrimental action means an act or omission causing, comprising, encouraging or involving any of the following (known as detriment):

- injury, damage or loss caused to the person
- damage caused to the person's property
- damage caused to the person's reputation
- intimidation, bullying or harassment
- unfavourable treatment in relation to the person's career, profession, employment or trade
- discrimination, prejudice or adverse treatment whether in relation to employment or otherwise disciplinary proceedings or disciplinary action.

Detrimental action also includes a threat of detriment, whether express or implied.

Disciplinary Advisory Panel means a panel convened by a decision maker with delegation to take disciplinary action involving demotion, direction to resign or dismissal.

The panel provides advice to the decision maker on matters where a decision maker is of the opinion that demoting, directing to resign or dismissing an employee may be an appropriate disciplinary action.

The convening decision maker may refer other matters to the panel where they are of the opinion that an advisory panel may assist them in reaching a considered decision about the appropriate disciplinary action.

The convening decision maker reaches a decision as to the proposed disciplinary action after taking advice. However, only the convening decision maker has a determinative role. All other members of the panel have an advisory role.

The convening decision maker may at their discretion remit a matter back to the panel before taking disciplinary action to consider further information provided by an employee.

The panel is constituted and has terms of reference set out in the [Disciplinary Advisory Panel – Terms of Reference \(PDF 137 KB\)](#). This document does not form part of the guidelines.

Disqualified person is defined in section 18 of the [Child Protection \(Working with Children\) Act 2012](#), which means:

- a person convicted of an offence specified in Schedule 2, if the offence was committed as an adult
- a person against whom proceedings for any such offence have been commenced, if the offence was committed as an adult, pending determination of the proceedings for the offence.

The employee, unless otherwise stated, relates to a permanently employed officer or employee under the Acts. See [section 2.1](#).

Internal disclosure

An internal disclosure is a disclosure made in good faith by a person regarding the alleged misconduct of another person. It is a specific ground of misconduct under the Acts for anyone to take any action against another person that is substantially in reprisal for that person making an internal disclosure.

It is a criminal offence under section 64 of the Children's Guardian Act 2019 to take, or threaten to take, detrimental action in respect of a person who reports or proposes to report, in good faith, a reportable allegation. Reportable allegations are handled in accordance with the policy Responding to Allegations against Employees in the Area of Child Protection (PDF 384 KB).

Public interest disclosures

The objects of the Public Interest Disclosures Act 2022 are to encourage and facilitate disclosures of serious wrongdoing in or affecting the public sector, promote a culture in which such disclosures are encouraged and protect those who make disclosures.

The Public Interest Disclosures Act 2022 defines three types of disclosures, voluntary, mandatory and witness.

It is a criminal offence under section 33 of the Public Interest Disclosures Act to take detrimental action against a person based on a suspicion, belief or awareness that a person has made, may have made or may make a public interest disclosure.

The onus of proof lies on the defendant to show that their suspicion, belief or awareness was not a contributing factor for the taking of detrimental action.

The department has additional responsibilities in relation to voluntary public interest disclosures which are reports of serious wrongdoing made voluntarily by a public official about the conduct of another public official.

The voluntary PID reporter's identity should be kept confidential and limited to only those people who need to know. The reporter's identity may be revealed in limited circumstances including with the reporter's consent and/or where there is a need to disclose the information for the matter to be effectively investigated or for disciplinary action to occur.

Schedule 2 offences include (but are not limited to): acts of indecency, sexual intercourse with a child under 10, sexual intercourse with a child between 10-16, sexual intercourse with a child between 16-18 under special care and possession, dissemination or production of child pornography.

A conviction includes a finding that the offence for a charge was proven, or that a person is guilty of an offence, even though the court does not proceed to a conviction. See section 5 of the [Child Protection \(Working with Children\) Act](#).

Secretary means the Secretary of the NSW Department of Education

Serious offence is defined in the Acts as a criminal offence that is punishable by imprisonment for 12 months or more in New South Wales, or an offence committed elsewhere than New South Wales, that if it were committed in New South Wales, would be an offence so punishable. (A person does not have to receive a penalty of 12 months imprisonment – if the offence can attract such a penalty it is classified as a serious offence).

Workplace manager includes the person with responsibility in managing a particular workplace including principals or directors

Unauthorised person as outlined in sections 93R of the [Teaching Service Act](#) and section 321 of the [Education \(School Administrative and Support Staff\) Act](#) means:

- (a) a person whose WWCC clearance is cancelled under section 23 of the [Child Protection \(Working with Children\) Act](#), other than a charged person, or
- (b) a charged person or the person being convicted of an offence specified in Schedule 2, or
- (c) other person who is required to hold but is not the holder of a WWCC clearance except for the following:
 - i. persons who are the subject of an interim bar
 - ii. persons who are refused a WWCC clearance and the time limit to apply for a review of the decision has not yet elapsed, or the application has been made but has not yet been dealt with
 - iii. persons who are not the holder of a WWCC clearance, are eligible to apply, but have not applied for a WWCC clearance
 - iv. persons who are exempt from the requirement to hold a WWCC clearance.

6. APPROPRIATE USE OF REMEDIAL ACTION OR DISCIPLINARY ACTION

Taking remedial action may be relevant in the following situations:

- managing unsatisfactory performance
- dealing with misconduct including when the decision maker is of the opinion that the employee has engaged in misconduct, where the imposition of remedial action is appropriate
- when an employee has been found guilty of an offence.

Taking disciplinary action is relevant in the following circumstances:

- when the decision maker is of the opinion that the employee has engaged in misconduct, and it is appropriate
- in dealing with unsatisfactory performance, where the performance is still unsatisfactory after a performance improvement program has been completed
- where an employee has been found guilty of a serious offence, where it is appropriate.

6.1 Disciplinary Options

The options for disciplinary action are:

- **Dismissal:** Dismissal should be regarded as the most serious action available.
- **Directing the employee to resign or to be allowed to resign:** This option should only be considered where a decision has been made that the employee should no longer be employed by the department. Should the person not resign, dismissal is the only alternative.
- **Reduction of the employee's salary or demotion to a lower position:** This may be relevant in some disciplinary cases, including those that arise from continued unsatisfactory performance, where remedial action or a performance improvement program has not resulted in improved performance. A demotion may be permanent or for a particular period. Such action must be taken in consultation with all affected parties.

- **The imposition of a fine:** The Acts provide that a fine may be imposed on an employee, including if the employee has voluntarily separated from the department prior to completion of the disciplinary process. Where a fine is not paid by an employee the Acts allow the fine to be deducted from the employee's salary or termination payments. Where the officer is no longer an employee the fine can be treated as a debt due to the crown.
- **A caution and/or reprimand:** Cautions and/or reprimands are made in writing and clearly state:
 - the standard of conduct or performance that is required
 - the possible consequences of a repetition of the conduct.

6.2 Remedial Options

Remedial options include but are not limited to:

- **Counselling:**
 - **Performance:** Counselling refers to support, advice and feedback. It should be part of daily supervision, ongoing performance and development cycle and enables an early response to unsatisfactory performance
 - **Conduct:** Counselling may also be used in relation to conduct matters where it is considered that it is not appropriate to undertake disciplinary action.
- **Training and development:** Training and development should be a usual part of managing staff to enable them to perform their work to the required standard. Where it is used in a remedial context, it should be directed to the relevant area of performance or conduct. Training and development may include professional learning, induction, mentoring, and referral to relevant policies.
- **Monitoring the employee's conduct or performance:** This process enables ongoing monitoring and feedback to the employee. The process should be transparent with feedback being a key aspect of the process. It can involve classroom observation, reviewing documentation and work products. Monitoring performance or conduct may highlight areas requiring training and development.
- **Implementing a performance improvement plan:** Any performance improvement plan must comply with the relevant departmental procedures, for example, for teachers, see the Teacher Improvement Program
- **Issuing a warning:** A warning addresses specific conduct or performance that is not satisfactory, provides the expectations of the employee in relation to ongoing conduct and performance.
- **Transferring at current pay rate:** This is relevant when there are reasons to believe that the issue is related to the employee's present work environment or that the work is beyond the person's capability and that training and development will not be sufficient to remedy the issue. Transfer can offer the person a fresh start and removes an employee from the particular environment.
- **Induction:** Induction is a particularly useful tool when new material and/or processes are introduced.
- **Mentoring:** Mentoring can enable peer assistance and support to be provided. It is important that the mentor should be a role model in relation to the areas of concern who understands the nature of the issue to be addressed.
- **Staff rotation:** This action may assist the employee to better understand the nature of the work undertaken by the department and expose the person to different processes. It may assist in improving performance by developing such understanding or by enabling the person to learn from other employees.

- **Referral to relevant policies:** Sometimes unsatisfactory performance or conduct can be due to unfamiliarity with relevant policy. In such a case, referral to the correct policies and procedures and an explanation of their relevance and effect, may assist the person to reach the expected standard of performance.

7. PROCEDURAL GUIDELINES FOR DEALING WITH MISCONDUCT

The Secretary is to deal with alleged misconduct by an employee. 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.

7.1 Timeframes

The process for addressing misconduct at all stages is to be undertaken in a timely and expeditious fashion.

As a guide only, uncomplicated matters should generally be concluded within three months from when the initial allegation is received by the Secretary.

Some matters will take longer to finalise for a range of reasons (see [section 4.2](#)) but officers and permanent employees should be advised of the allegations as soon as practicable.

An employee who is the subject of allegations, alleged victims, complainants, and school managers will be advised in writing at least once each school term of the progress of the investigation and when it is anticipated the investigation will be concluded. Where delays arise or are likely, information will be provided about the reasons for the delay.

Delays will be documented and monitored.

7.2 Misconduct

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 the taking of disciplinary action for example conduct that may be contrary to the [Code of Conduct](#) and/or other established policies of the department
- taking any detrimental action (within the meaning of the [Public Interest Disclosures Act 1994](#)) against a person based on a suspicion, belief or awareness that person has made, may have made or may make a public interest disclosure.
- 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:

- while the employee concerned was not on duty, or
- 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](#).

Further guidance in respect to conduct which should be addressed through disciplinary action is contained in the [Guidance on misconduct](#).

7.3 Risk management and the removal from duty during an investigation

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

A risk will be assessed that may consider the risks to:

- any complainant or class of complainants
- students/children
- potential witnesses
- the employee themselves
- any investigation
- the department itself.

A delegated officer may provide directions to an employee to safeguard the integrity of the investigation, for the protection of complainants, alleged victims and the school community generally.

If it is considered not feasible to manage the identified risks while the employee remains on duty or that the officer may be in breach of directions put in place to manage risk, the following options will be considered in order:

- placing the employee in an alternative location undertaking the same role
- placing the employee in alternative location undertaking alternative duties
- suspension with pay
- suspension without pay.

Suspension without pay should only be considered in matters where there is overwhelming evidence of guilt or where it becomes untenable for the employee to remain on alternative duties.

Alternative duties and suspension is a protective measure while the investigation and disciplinary process is being undertaken. It is not a disciplinary outcome available to a decision maker. The decision to remove an officer from duty is viewed to be a serious step where the risk cannot be managed in their workplace.

The paramount consideration in removing an employee from duty during an investigation is the protection of students. The decision will also consider a range of factual, contextual and management considerations in line with Premier's Memorandum [M1994-35 Suspension of Public Employees from Duty](#) including the:

- nature of the allegations; inclusive of the strength of the evidence implicating the officer
- nature and location of the current duties
- public interest
- efficient operation of the department
- maintenance of good order and discipline.

An employee who is placed on alternative duties or is suspended will be provided with reasons for the decision. The employee will be invited to request a reconsideration of the action taken and to provide a written submission to the delegated officer for consideration by the Disciplinary Advisory Panel. The delegated officer will determine the reconsidered outcome.

If further information is received, in the course of an investigation, which materially changes the risks, a reconsideration of the risk management action will be undertaken.

7.3.1 Alternative location or duties

An employee placed on alternative duties will continue to work under the same working conditions including salary, hours and vacation periods.

The employee may not be eligible for allowances where the new duties do not require those functions for example, year advisor or first aid allowances.

7.3.2 Suspension with or without pay

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 this 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 the employee is found not guilty in relation to a criminal matter and no disciplinary action is taken against the employee, the employee will be paid any withheld salary.

7.4 Investigation and disciplinary process stages

The process for dealing with an allegation of misconduct can be divided into three stages:

Stage 1: Determination of 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: Determination about appropriate outcome. This could involve dismissal of the allegation/s, no further action, remedial action, disciplinary action or a combination of remedial and disciplinary action.

7.4.1 Stage 1 – Initial determination of an appropriate course of action

7.4.1.1 Assessing the allegation or incident

The Acts allow the Secretary, through a delegated officer to take any of the following action:

- to take no further action in relation to the allegation or incident
- to take no further action against the employee
- to take remedial action against the employee
- to deal with the allegation of misconduct as a disciplinary matter in accordance with these guidelines.

In deciding what action to take, the delegated officer should assess the matter and consider the facts, seriousness and nature of the particular incident. This decision may rely solely on the available documentation. Alternatively, the alleged conduct may require an investigation.

If further information indicates that the employee may have engaged in misconduct, the delegated officer may determine that the matters require investigation.

A delegated officer may determine that no further action is required at any stage in the disciplinary process. The issues can be remitted back to a workplace manager for appropriate direct management action. The workplace manager is responsible for addressing the matter including informing relevant parties of the action to be taken.

Remedial action can also be taken under the Acts at any stage. A determination that misconduct has occurred does not have to be made for remedial action to be imposed by a delegated officer.

7.4.1.2 Responding to allegations of a child protection nature

In addition to the general assessment of allegations [above](#), the process for determining the appropriate course of action when dealing with an allegation of a child protection nature against an employee is outlined in [Responding to Allegations against Employees in the Area of Child Protection \(PDF 384 KB\)](#). These procedures clarify that the Secretary is required to respond to all allegations of a child protection nature against employees.

If the allegations constitute reportable conduct in line with the [Children's Guardian Act](#) they will be reported to the Children's Guardian. The Children's Guardian can exempt some classes or kinds of conduct from reporting.

7.4.1.3 Advising the employee

The employee who is the subject of the allegation must be advised at the earliest opportunity in writing of the intended action:

- If it is decided remedial action will be taken the employee is to be advised of the type of remedial action to be taken.
- If it is decided to treat the allegation as a disciplinary matter, the employee is to be advised of the intention to investigate.

Where the entire allegation can be put to the employee at the outset, the advice will accord with [7.4.2.4](#) (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 will:

- provide as much detail as possible about the nature of the allegations to the extent that it does not interfere with the investigation of another agency, places another person at significant risk or significantly impair the investigation.
- invite the employee to make a written submission, nominate relevant witnesses or provide supporting documentation relevant to the alleged conduct.

An employee is not required to make a submission. However, the employee's submission will be considered as part of the investigation, including whether the investigation should proceed and avenues of enquiry.

7.4.2 Stage 2 – The investigation stage

The investigation enables issues to be fully explored before any final decision is made in relation to the allegation. It also includes continuation of an internal investigation where external authorities have completed any relevant investigation.

The investigation will consider the employee's submissions, evidence and nominated witnesses. The investigator is not required to approach every nominated witness but will ensure the investigation report documents why a witness nominated by an employee was not approached. Circumstances include but are not limited to:

- where there is information that approaching a witness may adversely impact on their welfare
- where permission from a parent of a witness cannot be obtained
- a witness attesting solely to an employee's character and not to the matters subject to investigation

- where the nominated witness cannot be identified or is too broad including the nomination of a whole class of students
- where a sufficient sample of witnesses have been approached to provide a balanced account of the matters subject to investigation.

As outlined in Stage 1 ([7.4.1](#)), the department has procedures in place for dealing with allegations of different types of misconduct and for undertaking investigations.

There are common procedural requirements which apply when investigating allegations of misconduct:

7.4.2.1 The investigation will be conducted by an appropriate investigator/s.

The investigator/s should:

- understand the investigation process
- be free from actual or perceived bias. This includes not having direct involvement with the matter the subject of investigation including as a source of the initial allegation.
- have no personal involvement or friendship with the employee who is subject to the allegation/s
- be objective and not prejudge the matter
- be suitably experienced and qualified to undertake the investigation.

7.4.2.2 The investigation should be conducted in a confidential manner.

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 the subject of the investigation and their support person, will be advised that 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.

7.4.2.3 The absence of the employee does not preclude investigation.

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

- the employee fails to attend an interview or to provide a written response
- there are no reasonable circumstances mitigating the failure of the employee to attend an interview or provide a written response
- reasonable efforts are made to ascertain why the employee did not provide a response.

7.4.2.4 Allegations must be put to the employee with the opportunity to respond.

In addition to the advice provided in line with [7.4.1.3](#) (Advising the employee), the employee will be provided with complete allegations for response. Where appropriate to the circumstances for the efficient management of the investigation an employee may be provided with the complete allegations simultaneously with the investigation advice.

The employee will be provided with allegations containing sufficient detail to allow them to fairly and accurately respond. The employee should also be advised that the allegation if proven, may result in disciplinary action.

The identity of the person who made the allegations or is a witness is only to be revealed if it is essential for procedural fairness, to enable the employee to respond to the allegations.

The employee will be given a period of no less than 14 days in which to respond to specific allegations or 7 days to request an interview. This allows time to seek appropriate support and advice.

The employee is to be advised that they may also bring any written submissions to any interview and be given seven days (or longer in complex matters) from an interview to provide any further written submissions.

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

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

7.4.2.5 Notification and advice of interview

When an employee agrees to an interview to respond to allegations they must have been:

- provided with at least 24 hours' notice, unless they have elected to proceed within this period
- notified of the time, date, location, nature and purpose of the interview and the name/s of the officer/s conducting the interview
- advised about accessing the guidelines on the department's website
- advised of the allegations to be canvassed at the interview, to the extent that the allegations are known at that time
- provided an opportunity to make comment on any relevant issue, and to give their version of the relevant event/s
- advised that any admissions made will be considered should the matter proceed to be dealt with as a disciplinary matter.
- advised that a support person may be present and their role.
- given the opportunity to raise any special needs which will need to be accommodated in the interview
- advised that a copy of the record of interview (either an audio recording or transcript) will be provided upon request.

7.4.2.6 General conduct of interviews

How an interview is conducted will depend on the nature of the misconduct, the sources of evidence, the availability of witnesses and the willingness of the person to be interviewed. The common elements of an interview are that:

- it will occur in private
- the investigators will be fair, courteous and impartial
- any person interviewed can have a support person ([section 4.5](#))
- procedural information will be provided to ensure the person understands the implications of providing information to the investigator
- an audio recording device will generally be used to record interviews and a copy of the audio recording or transcript offered. However, this is subject to the consent of the person who is being interviewed. In cases where interviews are not recorded, notes or a statement will be taken

- a copy of any interview transcript, notes or statement can be provided to the interviewee on request.

7.4.2.7 Interview

When interviewing a person, the investigator will:

- advise that the interview will be recorded subject to their agreement, and they can be provided with a copy of the audio/transcript or notes
- advise of the purpose of the interview and how this information will be used
- clarify the role of the support person in line with [section 4.5](#), including that they can request a halt to the interview if they wish to speak privately to the employee/witness
- advise the person to maintain confidentiality and any limitations on confidentiality that can be afforded by the investigation.

In addition, where the person being interviewed is the employee subject to allegations the investigator will:

- advise the employee that any admissions made may be used in the decision making process
- advise the employee that the employee will have an opportunity to respond to the questions asked and to provide comments about relevant issues, including providing their version of events
- put each particular of the allegation/s to the employee and invite them to respond
- clarify their response or any other matters relating to the allegation/s
- advise the employee that they can provide a further written submission in 7 days
- advise the employee of the next steps in the investigation and disciplinary processes including the option to provide further submissions if a disciplinary action is proposed.

An investigator must:

- avoid using accusing or intimidating language or tone of voice
- avoid making comments about the answer given
- not communicate personal views or the views of other people
- ask the employee if there is anything else they wish to say
- not indicate that a view has been formed.

7.4.2.8 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
- site inspections
- expert evidence such as technical and forensic evidence.
- material from other agencies provided under information sharing arrangements.

7.4.2.9 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 that 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.

7.4.2.10 Preparation of the investigation report

The investigator examines the evidence and analyses any submission received from the employee. The investigator will prepare an investigation report that:

- consolidates all the material gathered during the investigation process
- details the allegation/s involving the employee
- outlines the investigation process followed
- provides a factual analysis of the evidence
- provides reasons for not interviewing witnesses nominated by the employee
- 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 upon which the view is based
- sets out the investigator's recommendation, if appropriate, discusses the relative seriousness of the conduct and whether the matter should be treated as a disciplinary matter, including any comment on systemic or operational matters that need to be addressed
- has all relevant attachments, such as correspondence with the employee, disciplinary and other interviews, and witness statement/s.

7.4.2.11 Finalisation of the investigation without further action

If the investigator is satisfied, at any time, that the facts do not support the allegation of misconduct, a recommendation that the matter be dismissed or no further action be taken will be forwarded to the delegated officer.

If the delegated officer determines that the allegation/s of misconduct is not sustained, a finding that the allegation is dismissed and/or no further action should be taken will be made.

The employee will be advised that the allegation/s is not sustained and that no action will be taken. The complainant, the alleged victim and key witnesses (if applicable) are also advised of the outcome of the investigation.

7.4.3 Stage 3 – Determination about appropriate outcome by decision maker

7.4.3.1 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 prior to forming an opinion.

Should it be necessary to put further allegations to the employee, the processes for putting allegations and allowing an employee to respond must be followed.

7.4.3.2 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 (that is they may result in the demotion, a direction to resign or the dismissal of the employee) the decision maker should ensure that they are '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.

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

7.4.3.3 Misconduct not found

The decision maker may determine that 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) but such records will be retained in accordance with the [State Records Act 1998](#). All records of disciplinary investigations are retained by EPAC under restricted access.

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

7.4.3.4 Misconduct proven

The decision maker, who finds the employee has engaged in misconduct, 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. Advice may be sought 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 no further action against the employee but take management action to address any systems or organisational issues
- take remedial action with respect to the employee

- take disciplinary action against the employee
- take both remedial and disciplinary action against the employee.

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

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

- the facts of the case
- whether the employee poses an ongoing risk to children
- the impact of the conduct on the objectives of the Acts (see section 4.1)
- the nature and seriousness of the proven misconduct, including the effect and circumstances of the incident
- the degree of relevance of the conduct matter to the employee's position and duties
- the employment history and general conduct history of the employee
- whether the conduct or substantially similar conduct has previously been the subject of remedial or disciplinary action
- whether policies and guidelines applicable to the conduct were in place, were known, were being followed
- 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 if so, what action should be taken.

7.4.3.6 Misconduct proven – no further action and remedial action

If the decision maker decides that the employee has engaged in misconduct but that no disciplinary action will be taken given the facts of the particular case, the employee will be notified in writing of the outcome and where applicable details of any remedial action to be taken.

7.4.3.7 Proposing disciplinary action

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.

Where a decision maker is of the opinion that the appropriate disciplinary action which is within their delegation includes demotion, direction to resign or dismissal they must first refer the matter to the Disciplinary Advisory Panel. The only exception is where an employee has been convicted of a Schedule 2 offence and is unauthorized to work in child related employment. This will result in summary dismissal.

7.4.3.8 Disciplinary Advisory Panel

A Disciplinary Advisory Panel (the panel) will be convened to provide advice to the decision maker on matters where a decision maker is of the opinion that demoting, directing to resign or dismissing an employee may be an appropriate disciplinary action.

7.4.3.9 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, the employee must be notified in writing of the decision and the proposed disciplinary action to be taken.

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 which includes 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.

7.4.3.10 Submissions prior to disciplinary action

Before taking disciplinary action, the decision maker must have invited the employee and/or their union to make a submission and/or participate in an interview. This information, if provided, must be considered before a final decision is made.

The employee may request within 7 days of receipt of the written notice of the proposed disciplinary action, to attend an interview with the final decision maker, accompanied by a support person before a final decision is made. The support person may speak on behalf of the officer but may not cross-examine the decision maker.

An interview is not intended to provide an opportunity to further examine evidentiary material or to provide extensive submissions on the evidence. The purpose of the interview is for the decision maker to hear submissions on the proposed disciplinary action.

The employee and/or union has 14 days from the receipt of the written notice of the proposed disciplinary action to make a submission and to provide any additional information which they consider should be taken into account in relation to the disciplinary action being proposed before a final decision is made.

The decision maker has the discretion to 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.

7.4.3.11 Taking disciplinary action

In making a decision as to disciplinary action, the decision maker must consider all the material before them, including the content of any interview or further submissions from the employee.

Where a matter has been considered by the Disciplinary Advisory Panel it can be remitted back for further consideration at the discretion of the decision maker.

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

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

7.4.4 Legal advice

Although there is no right to formal legal representation during an interview with the decision maker, all parties have a right to access legal advice throughout the investigative and disciplinary process. This includes the employee who is subject to the allegations, the investigator and the decision maker.

7.4.5 Rights of appeal

There is no internal right of appeal of a decision as to disciplinary action.

However, the employee may be able to seek appropriate external review. Such review may include an application to the Industrial Relations Commission, or other appropriate body.

7.4.6 External agency requests

The Children's Guardian or ICAC may request that the department review its handling of a matter or the decision reached. Where the department agrees to undertake a review, it will be undertaken by an officer who has not handled the matter and the decision made by an officer more senior than the initial decision maker.

7.5 Action taken if an employee has resigned or retired

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

A decision to pursue such action depends on a number of factors including, but not limited to:

- the seriousness of the matter
- the protection of children and whether the employee may be likely to return to teaching or other child-related employment at some future date
- the practicality of access to the former employee
- the cost benefit to the department of pursuing the matter.

With the exception of when a fine is imposed, taking disciplinary action does not affect the former employee's retirement or resignation or the relevant benefits and liabilities. If a fine is imposed, it may be recovered from the former officer as a debt due to the Crown.

If an employee seeks to resign or medically retire prior to the completion of any disciplinary process, the Secretary/delegated officer has the power to refuse to accept the resignation or medical retirement.

7.6 Notifying allegations of misconduct to external agencies

There are legislated requirements for the department to report certain allegations of misconduct to the Children's Guardian, the Department of Communities and Justice, the NSW Police Force (if the allegations potentially constitute a criminal offence), the NSW Education Standards Authority, the NSW Ombudsman and the Independent Commission Against Corruption.

The outcomes of investigations of allegations of serious wrongdoing resulting from a voluntary public interest disclosure are also required to be reported to the NSW Ombudsman, irrespective of the finding made.

Public Interest Disclosure reporting requirements are outlined in the:

- [Public Interest Disclosures Procedures](#)

The outcomes of investigations of allegations of reportable conduct of a child protection nature against employees are also required to be reported to the Children's Guardian if a finding is made that the employee has engaged in the following conduct:

- (a) sexual misconduct committed against, with or in the presence of a child, including grooming of a child
- (b) any serious physical assault of a child.

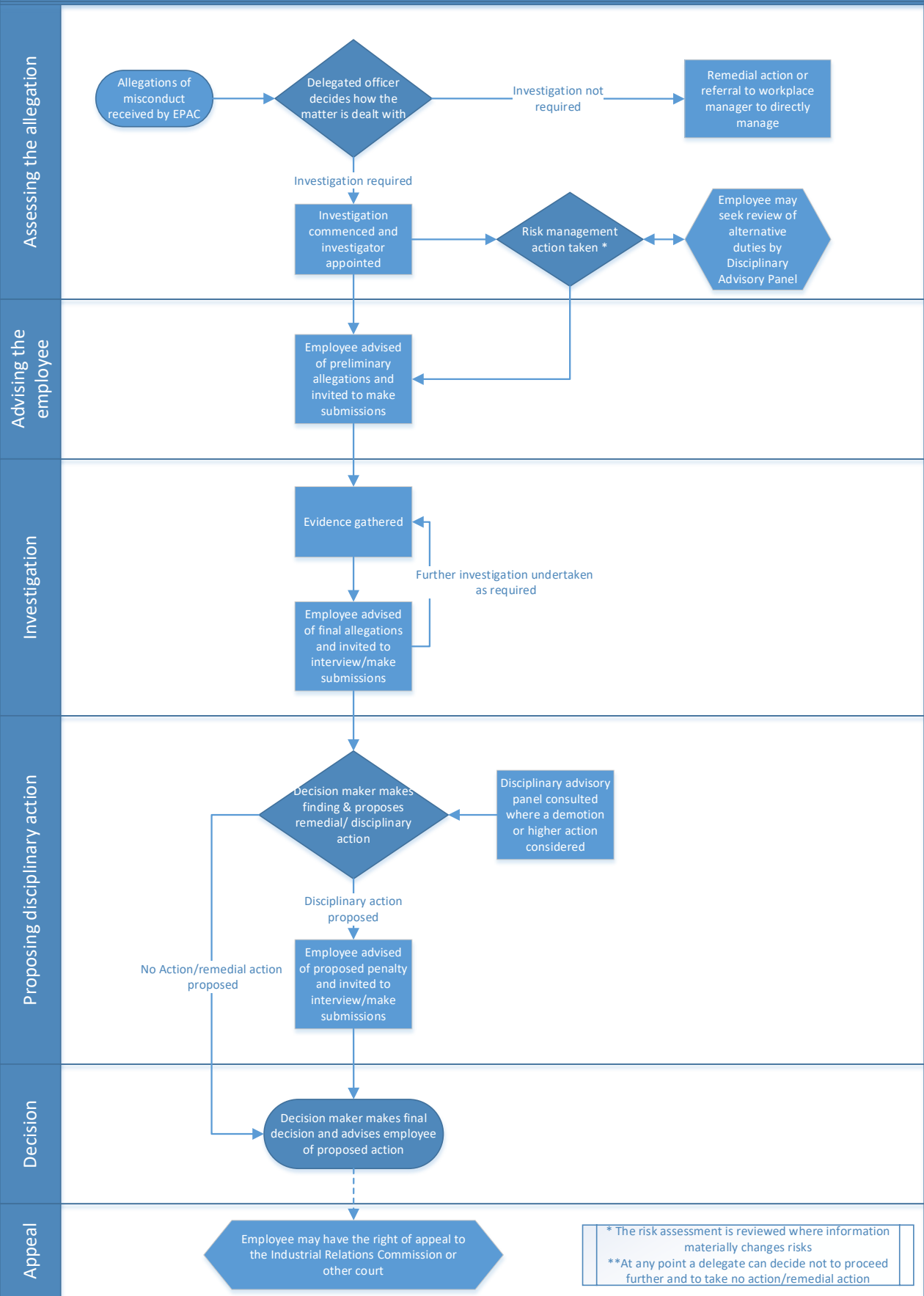
Certain external reporting requirements are outlined in the following documents:

- [Responding to Allegations against Employees in the Area of Child Protection \(PDF 384 KB\)](#)
- [Child Protection Policy Guidelines: Responding to and reporting students at risk of harm](#)

In general, external notification needs to be made when any action is taken to investigate matters that have been subject of allegations involving the following matters:

- risk of significant harm to children or young people
- any sexual offence, or sexual misconduct, committed against, with or in the presence of a child
- any assault, ill treatment or neglect of a child
- any behaviour that causes psychological harm to a child
- certain criminal offences, including fraud
- corrupt conduct or maladministration
- allegations that may impact on teaching accreditation.

Disciplinary Process



8. PROCEDURAL GUIDELINES FOR DEALING WITH UNSATISFACTORY PERFORMANCE

The legislation provides for:

- persons permanently employed under the [Education \(School Administrative and Support Staff\) Act](#) to have their performance reviewed periodically
- officers employed under the [Teaching Service Act](#) to have their performance reviewed at least annually
- the performance review to be against established criteria/standards
- the Secretary to review the performance of an employee on such other occasions as the Secretary considers appropriate
- a performance improvement program to be implemented, if the opinion is formed following a review of performance that the employee is not performing their duties in a satisfactory manner
- the requirement for an employee to participate in any such performance improvement program in the manner required by the program
- the performance improvement program to be on terms and is to be implemented for such period as the Secretary considers appropriate.

The Secretary will delegate their functions to deal with unsatisfactory performance to an officer who understands the process and has the resources available to them to carry out the delegated function.

8.1 Responding to unsatisfactory performance

Workplace managers/supervisors are responsible for ensuring that employees under their supervision meet required work standards. It is important that employees who are not meeting the required standards have those issues addressed as soon as performance difficulties are identified.

Generally, unsatisfactory performance means not meeting agreed goals and tasks, timeframes or criteria/standards of work. The agreed criteria/standards can be in a work plan or in any other documentation, for example a Performance and Development Plan. Any standard that is applied must be relevant to the employee's position description, duty statement or articulated criteria, for example Australian Professional Standards for Teaching Staff.

8.2 Performance management

The following strategies should be implemented and referred to in dealing with instances of unsatisfactory performance:

- provide and adhere to induction programs
- ensure there are clearly articulated work standards and performance requirements which are reasonable and attainable
- collaboratively develop performance and development plans to assist the employee to reach expected work standards
- ensure that there is a clear understanding of the work to be performed
- ensure training and development opportunities are provided
- remove barriers to effective performance including:

- ensuring equitable allocation of work
- appointing officers and employees on their ability to perform the job
- ensuring fair and equitable distribution of overtime and leave
- ensuring a fair and transparent performance and development cycle.

8.3 Consideration of organisational and non-work-related factors

The manager/supervisor should, where relevant, consider factors which may contribute to the unsatisfactory performance. Factors contributing to poor performance may include:

- organisational factors (for example poorly managed restructuring; poor work and job design; ineffective recruitment and selection resulting in a 'mismatch' of people and jobs; inappropriate planning, resourcing, and competing deadlines)
- management practices (for example inappropriate or unacceptable management approach; inconsistent application of performance standards; biases, changes in opinion or lack of care or commitment on the manager/supervisor's part)
- training and development needs (for example inadequate induction and explanation of job role/responsibilities; insufficient skills, training, or experience to perform the duties and responsibilities of the position; unsupported introduction of new technology)
- poor communication between management and employees (for example inadequate performance evaluation and feedback)
- inappropriate work environment (for example occupational health and safety standards not being met)
- direct or indirect discrimination or workplace bullying and harassment
- social factors (for example conflicting personality clashes within the work environment)
- personal issues (for example lack of motivation or commitment; health, mental health or family problems; drug and alcohol misuse).

Performance difficulties that are not work-related may require intervention or assistance by management, employee associations, an employee assistance provider, or external individuals or organisations. The cause of performance difficulties must be identified and appropriate adjustments and/or strategies developed, including implementation of an improvement program, to assist the employee to deal with identified poor work performance.

Unsatisfactory performance should be dealt with by the manager/supervisor as soon as performance difficulties are identified. The nature of the unsatisfactory performance should be clearly articulated, with reference to examples. This enables the employee and the workplace manager/supervisor to be clear about the issues and concerns.

8.4 Performance principles generally

Dealing with unsatisfactory performance requires a staged process which is fair, timely and transparent, consistently applied and has regard to the particular circumstances of the case.

Improvement of performance is the primary goal and staff have a right to regular feedback about their performance and development.

The process should also have regard to any relevant written documentation that may be in place.

The key stages for addressing unsatisfactory performance are:

1. early identification and individualised targeted support through supervisory performance and development discussions

2. undertaking a performance improvement program
3. taking remedial or disciplinary action.

While performance and development is a shared responsibility between an employee and their supervisor, the supervisor has the primary responsibility for performance management. Early identification and provision of individualised targeted support in most cases should address an unsatisfactory performance problem. Performance feedback and appraisal should be ongoing and part of supervisory performance discussions with employees. It is only if action at this stage has failed to rectify the unsatisfactory performance that consideration needs to be given to involving the subsequent stages.

The department has established procedures for formally addressing unsatisfactory performance, should processes of support aimed at assisting them to meet required criteria/standards and remedial action not be successful.

These are:

- Teacher Improvement Program
- Executive Improvement Program
- Principal Improvement Program
- Procedures for Managing School Based Non-Teaching Staff Identified as Having Performance Difficulties.

If, at the end of a performance improvement program, the employee's performance is satisfactory, no further action is required other than the usual performance and development reviews.

8.5 Remedial action vs Disciplinary action

Before implementing disciplinary action to deal with unsatisfactory performance, the manager/supervisor must be satisfied that individualised and targeted support has been provided to the employee through an improvement program to enable him or her to perform at the required standard.

Disciplinary action is not the first option for managing unsatisfactory performance, but may become necessary when performance remains unsatisfactory following an improvement program. Disciplinary action is only appropriate where performance remains unsatisfactory after the employee has been given a reasonable opportunity to improve his or her performance.

If the Secretary is of the opinion that an employee is not performing in a satisfactory manner or to a satisfactory level, he or she may decide to take remedial action unless the officer is a school principal in which case disciplinary action will commence.

8.6 Unsatisfactory performance of an employee

If an employee's performance has been assessed to be unsatisfactory following completion of a performance improvement program, they are directed to alternative duties in a location where they are not carrying out the inherent duties of their position.

The manager/supervisor forwards the improvement program documentation to EPAC for review as to whether the process used in the performance improvement program was appropriately followed.

8.7 Unsatisfactory performance of principals

If the decision maker is of the opinion that a school principal's performance is still unsatisfactory following completion of a performance improvement program or following the

principal's failure to participate in or satisfactorily complete such a program, the decision - maker may:

- dismiss the school principal from the teaching service
- demote the school principal to a lower position in the teaching service.
- Before taking any such action with respect to a school principal, the decision maker must:
- notify the principal in writing of the proposed action and the reasons for taking that action
- give the principal at least 21 days in which to make a written submission to the Secretary in relation to the proposed action
- take into consideration any written submissions received from the principal during that period.

8.8 Determination about appropriate outcome (other than school principals)

If the performance of an employee (other than a school principal) is still assessed to be unsatisfactory following the completion of a performance improvement program or following his or her failure to participate in or to satisfactorily complete such a program the decision maker may take:

- remedial action
- disciplinary action
- a combination of remedial action and disciplinary action.

The decision maker will advise the employee in writing that his or her performance remains unsatisfactory and that this assessment may lead to disciplinary action.

The notification should indicate:

- the details of the unsatisfactory performance against the criteria/standard in the performance improvement program
- that the decision maker is of the opinion that the performance is still unsatisfactory
- that the decision maker is considering disciplinary action and the implications of that action including the most serious disciplinary action that may be imposed
- a summary of the process taken to date including the reasonable opportunity the employee has had to respond to the decision maker about his or her performance
- advice that the employee will be provided with an opportunity to provide a submission in relation to any proposed disciplinary action
- that the officer's or employee's response will be taken into consideration in deciding whether to take disciplinary action.

8.9 Unsatisfactory performance resulting in remedial action

All remedial and formal action contained in the department's relevant improvement program and procedures as outlined in [section 8.2](#) must be exhausted before these guidelines apply.

However, the decision maker has the option to apply remedial action at any stage in the process if they determine that further remedial action may successfully address a person's performance difficulties.

If the decision maker determines that remedial action is warranted, the employee should be advised in writing about:

- the remedial action proposed

- the reasons for the decision
- the consequences of the decision
- the process taken to date
- disciplinary action being taken if unsatisfactory performance continues or re-occurs
- how to access further assistance if required.

Where the proposed remedial action is the transfer to another position that would require the employee to change residence, then the person must be given an opportunity to make a submission with respect to such proposed remedial action before it is implemented. The decision maker should be satisfied the person has no valid reason for refusing the transfer.

8.10 Unsatisfactory performance resulting in disciplinary action

In making a decision about disciplinary action the decision maker must, prior to notifying the employee of this fact, give consideration as to what is the most severe disciplinary action that might apply to such unsatisfactory performance.

The decision maker must exercise his or her discretion and not adopt a policy that unsatisfactory performance will always attract the same disciplinary action.

In considering disciplinary action, the decision maker must consider:

- the protection of children is to be the paramount consideration
- the facts of the matter
- the impact of the unsatisfactory performance on the employee's work
- the impact of the unsatisfactory performance of the objectives on the relevant Act
- the nature and seriousness of the unsatisfactory performance
- the skill, experience and position of the employee
- any mitigating or extenuating circumstances that may have contributed to performance difficulties
- the employment history of the employee
- whether the unsatisfactory performance has previously been the subject of counselling or previous remedial or disciplinary action
- the effect of the proposed action on the employee
- the employee's response.

If the decision is to take disciplinary action the decision maker must write to the employee and include the following:

- the disciplinary action being considered, including the most severe disciplinary action that is being considered
- an outline of 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 21 days in relation to the disciplinary action being considered.

The decision maker has discretion to extend the period for response if the officer applies for additional time within the 21-day period and provides reasonable grounds for seeking the extension.

Before the decision maker makes a decision as to disciplinary action they will:

- provide an opportunity for the employee to participate in an interview with a support person and/or a written submission
- consider the submissions made by the employee and/or union.

The decision maker is also not precluded at this stage from ordering remedial action instead of disciplinary action or in conjunction with disciplinary action if they are of the view that a matter could be more effectively addressed in this manner.

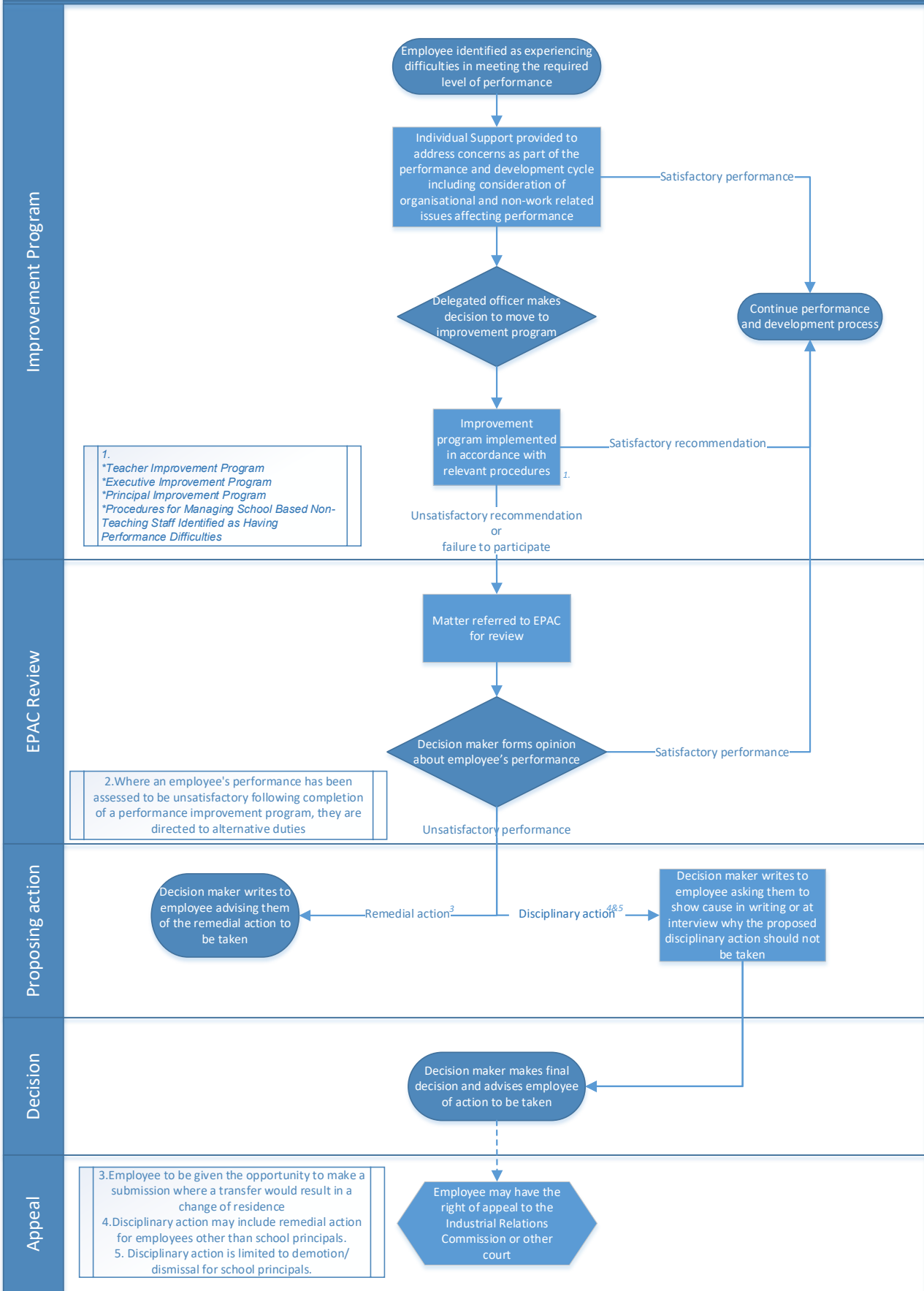
In relation to school principals, the decision maker may only consider demotion or dismissal (see [section 8.7](#)).

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

8.11 Assistance in applying the guidelines

The decision maker may seek advice from relevant internal or external experts to assist in forming a view as to how the matter might proceed.

Process for dealing with unsatisfactory performance



9. PROCEDURAL GUIDELINES FOR DEALING WITH A SERIOUS CRIMINAL OFFENCE

These guidelines apply to situations in which:

- an employee or temporary employee is charged with a serious criminal offence (that is one punishable by imprisonment for 12 months or more)
- an employee is found guilty of such an offence.

The Secretary or their delegate can take action in respect of an employee found guilty of a serious offence.

For matters that involve an employee or temporary employee being charged and/or convicted of serious sex offences or offences against children that render them barred to engage in child-related work (defined by the [Child Protection \(Working with Children\) Act](#); refer to [section 10](#)).

9.1 Notification requirements

Under the Acts, an officer, permanent employee or temporary employee who:

- (a) is charged with, or is found guilty of an offence that is punishable by imprisonment for 12 months or more in New South Wales, or
 - (b) is charged with, or who is found guilty elsewhere than New South Wales of an offence, that if it were committed in New South Wales, would be an offence so punishable,
- must immediately report that fact to the Secretary.

The role of receiving this information has been delegated to the workplace manager, for example, a teacher must advise their principal. The workplace manager/supervisor must immediately report that fact to EPAC.

If an employee has reason to believe that the person has been charged with having committed or has been convicted of a serious offence but has not reported that fact as required, they must report the matter to EPAC.

9.2 Procedural fairness

Prior to taking any disciplinary action, the decision maker must ensure that the principles of procedural fairness have been followed and that the employee has been provided with the opportunity to make submissions about any proposed disciplinary action.

9.3 Removing the officer from duty following a criminal charge or criminal conviction

Decisions in respect to risk management and removing an officer from duty are made in line with the process described at [section 7.3](#).

9.4 Investigation of a criminal matter that directly relates to an employee's work

The timing of conducting an internal investigation depends on the police investigation. All stages of dealing with the allegation as a disciplinary matter should continue unless requested by the external authority not to proceed. If the process is not completed and the employee is charged by the police it is usually appropriate to await the outcome of the court proceedings. Such matters are generally negotiated on a case-by-case basis having regard to timeliness, procedural fairness and the requirements of other agencies.

The department will seek information on the progress of a matter and act promptly upon conclusion of the criminal proceedings. The employee has an obligation to inform the Secretary if they are convicted of a serious offence.

9.5 Employee convicted of a serious offence

When an employee has been found guilty (with or without conviction) of a serious offence, the relevant material and facts can be forwarded directly to a decision maker. The decision maker may decide to:

- take disciplinary action
- take remedial action
- take no further action.

A decision maker must exercise discretion in selecting the appropriate action and not adopt a policy that a particular serious offence will always attract the same action, unless the offence renders the employee barred to engage in child-related work. It should not be assumed that all other convictions will result in either disciplinary action or remedial action.

However, if an employee becomes an unauthorised person, their employment will be terminated effective from the date upon which the employee became an unauthorised person.

In all matters other than those involving an unauthorised person, the decision maker should, if available, be provided with:

- the certificate of conviction
- the agreed facts or Court findings where available
- a transcript of the Judge's/Magistrate's sentencing remarks, where available.

9.5.1 What issues should be considered in deciding the appropriate action

In determining the appropriate action, the decision maker will have regard to the objects of the legislation.

Issues to be considered include:

- the facts of the case if known
- whether the employee poses an ongoing risk to children
- the impact of the conduct on the objectives of the Acts (see [section 4.1](#))
- the nature and seriousness of the proven conduct, including the effect and circumstances of the incident
- the degree of relevance of the conduct matter to the employee's position and duties
- the employment history and general conduct history of the employee
- whether the conduct or substantially similar conduct has previously been the subject of remedial or disciplinary action
- whether orders of the Court prevent the employee attending for work
- 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.

9.5.2 Decision process

9.5.2.1 Disciplinary action proposed

If the decision maker decides disciplinary action is appropriate, the employee must be notified in writing of that opinion and of the disciplinary action being considered, including the most

severe disciplinary action. Before any disciplinary action is taken, the employee has an opportunity to make a submission in relation to the disciplinary action being considered.

If the decision is to take disciplinary action, the written notification must state:

- the details of the serious offence
- the materials to be taken into account, for example certificate of conviction (if available), transcripts from criminal proceedings, other criminal convictions
- 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
- details of any previous employment matters, such as past remedial action or discipline matters or previous satisfactory work history that 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
- that these further submissions and/or additional information will be considered before a final decision is made to implement the disciplinary action being considered.

9.5.2.2 Employee submissions

Before taking disciplinary action, the decision maker must have invited the employee and/or their union to make a submission and/or participate in an interview. This information, if provided, must be considered before a final decision is made.

The employee may request within 7 days of receipt of the written notice of the proposed disciplinary action, to attend an interview with the final decision maker, accompanied by a support person before a final decision is made. The support person may speak on behalf of the officer but may not cross-examine the decision maker.

An interview is not intended to provide an opportunity to further examine evidentiary material or to provide extensive submissions on the evidence. The purpose of the interview is for the decision maker to hear submissions on the proposed disciplinary action.

The employee and/or union has 14 days from the receipt of the written notice of the proposed disciplinary action to make a submission and to provide any additional information which they consider should be taken into account in relation to the disciplinary action being proposed before a final decision is made.

The decision maker has the discretion to 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.

9.5.2.3 Decision

In making a decision as to what disciplinary action to impose, the decision maker must consider all the material before them, including the content of any interview or further submissions from the employee. The decision maker should make a final decision promptly and expeditiously.

The decision maker is not limited to a single course of action and may take no action or a type of disciplinary action in combination with other disciplinary or remedial action.

Where the 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.

Where the decision maker is of the opinion that the appropriate disciplinary action which is within their delegation includes demotion, direction to resign or dismissal they must first refer the matter to the disciplinary advisory panel.

A Disciplinary Advisory Panel (the panel) will be convened to provide advice to the decision maker on matters where a decision maker is of the opinion that demoting, directing to resign or dismissing an employee may be an appropriate disciplinary action.

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

9.5.3 Employee found not guilty of a serious charge

A not guilty finding or dismissal of the charge does not necessarily mean that the employee may not have engaged in misconduct. A criminal offence must be proved beyond reasonable doubt. The lesser civil standard of the balance of probabilities applies to misconduct matters.

Consideration will be given to whether there is sufficient reason to deal with the matter as an allegation of misconduct. These considerations also apply where a criminal charge does not proceed to a hearing or the police decide not to lay any charges.

If it is decided to deal with the matter as an allegation of misconduct the guidelines will apply and should be followed. Every effort should be made to ensure that any further investigation is completed expeditiously as usually considerable time may have elapsed pending the outcome of the criminal proceedings.

10. PROCEDURAL GUIDELINES FOR DEALING WITH CHARGED PERSONS AND UNAUTHORISED PERSONS

These procedures apply when an employee or temporary employee who is charged with and/or convicted of serious sex offences, or offences against children that would render them barred from engaging in child-related work (as defined by the [Child Protection \(Working with Children\) Act](#)).

The department requires that employees hold a current WWCC clearance to work in child related employment. For further information see the [Working with Child Check](#) policy.

Child-related work is defined in sections 6 and 7 of the [Child Protection \(Working with Children\) Act](#). Additional roles are identified in the [Child Protection \(Working with Children\) Regulation 2013](#).

Under this system, a WWCC will either result in a clearance to work with children for five years or a bar against working with children. Individuals who receive a WWCC clearance will be subject to ongoing monitoring and a person's WWCC clearance may be cancelled or may become subject to an interim bar as determined by the Office of the Children's Guardian.

The Office of the Children's Guardian must cancel the WWCC clearance of a person if the Office of the Children's Guardian becomes aware that the person is or becomes a disqualified person (see [Dictionary](#)), or if the Office of the Children's Guardian is satisfied that the person poses a risk to the safety of children.

10.1 Charged person and unauthorised person status must be notified to the Secretary

An employee or temporary employee who is charged with an offence that would render them barred from working in child-related work or who becomes an unauthorised person must immediately report that fact to the Secretary by contacting their workplace manager.

The workplace manager/supervisor must notify EPAC of the employee or temporary employee's circumstances.

If a workplace manager/supervisor or other senior officer becomes aware that an employee or temporary employee has been charged or convicted of such offences, and has not notified the Secretary themselves, they must immediately notify EPAC.

10.2 Charged person

Under the Acts, if an officer, permanent employee or temporary employee has their WWCC clearance cancelled pending determination of proceedings for an offence listed in Schedule 2 to the [Child Protection \(Working with Children\) Act](#), they are no longer the holder of a WWCC clearance and must not be allowed to continue to engage in child-related work.

Charged persons must be removed from child-related work. Consideration should be given to whether the employee can be placed on alternative duties.

An employee who becomes a charged person can be suspended with or without pay. All decisions about suspensions must be reviewed every 30 days.

10.3 Charged person found not guilty of the offence

Even though the charged person has been found not guilty of the offence, they are still not able to work in child-related work until they have a WWCC clearance. The employee will need to reapply for a WWCC clearance.

Refer also to [section 9.5.3](#) in the event that the person subsequently obtains their WWCC clearance.

10.4 Charged person found guilty of the offence

If a charged person is found guilty of the offence (with or without a conviction) that person becomes an unauthorised person.

10.5 Termination of employment of unauthorised persons

The Acts provide for the immediate termination of employment of an employee or temporary employee who is or becomes an unauthorised person and who is employed by the department in child-related work as defined by the [Child Protection \(Working with Children\) Act](#).

The Acts refer to a person whose substantive position is child-related work, notwithstanding that they may be temporarily employed or placed on alternative duties in a different position.

10.6 Process of dismissal following a person becoming an unauthorised person

Following a person becoming unauthorised the dismissal takes effect immediately and the employee or temporary employee will not have any right to provide a response or to an interview.

The person will be advised in writing as soon as practicable that they have been dismissed, or in the case of a temporary employee, that their contract has been terminated.

10.7 Seeking a review of unauthorised person status

A person may be eligible to seek a review of the decision to refuse a WWCC clearance or the decision to cancel their WWCC clearance under Part 4 of the [Child Protection \(Working with Children\) Act](#).

Any such application is determined by the NSW Civil and Administrative Decisions Tribunal.

10.8 Person dismissed as unauthorised person, subsequently obtains a WWCC clearance to work with children

If a person is dismissed as an unauthorised person and they subsequently obtain a WWCC clearance within 12 months from the date of that dismissal, the person is entitled to be reinstated to, or re-employed in a position that is similar to the position that person held prior to their dismissal. The person must take immediate steps following advice that they have a WWCC clearance to advise the department that they will seek reinstatement.

The person is deemed to have never been dismissed from employment and to have been on leave without pay during the period between dismissal and reinstatement or re-employment. Regulations can be made under the Acts dealing with leave, superannuation entitlements and similar issues.

10.9 Disciplinary action against a person who ceases to be an unauthorised person

In circumstances where a person ceases to be an unauthorised person and is reinstated or re-employed in accordance with the relevant Acts, there is nothing to prevent the department from dealing with that person under any other provision of the Acts in relation to the reasons as to why that person was an unauthorised person.

10.10 Compensation or other industrial remedies

The Industrial Relations Commission or any other court or tribunal does not have jurisdiction to order reinstatement or re-employment of an employee contrary to a termination of employment under the relevant Acts in respect of a person who has effectively been deemed to be an unauthorised person or to order the payment of damages or compensation for any such termination or other related matter.

10.11 **Compensation or other industrial remedies**

The action takes effect immediately without any right to a hearing or any requirement to comply with the rules of procedural fairness.