

NEW SOUTH WALES  
DEPARTMENT  
OF EDUCATION  
AND TRAINING



# Guidelines for the Management of Conduct and Performance

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# Table of Contents

<b>1. Legislative Scheme .....</b>	<b>4</b>
<b>2. Application of Provisions .....</b>	<b>4</b>
2.1 Conduct and Performance Procedures	4
2.2 Procedures relating to bankruptcy, private and secondary employment, prohibited persons and notification of serious criminal offences	4
2.3 Transitional Provisions	5
2.4 Application of Existing Policies	5
<b>3. Purpose and Operation .....</b>	<b>5</b>
3.1 Policy Statement	5
<b>4. Principles Underpinning the Guidelines.....</b>	<b>7</b>
4.1 Timeliness	7
4.2 Procedural fairness	7
4.3 Deciding each matter on its merits	8
<b>5 GLOSSARY/Dictionary .....</b>	<b>9</b>
<b>6. Appropriate Use of Disciplinary or Remedial Action.....</b>	<b>10</b>
6.1 Use of Disciplinary Options	10
6.2 Use of remedial options	11
<b>7. Procedural Guidelines for dealing with Misconduct .....</b>	<b>13</b>
7.1 Timeframes	13
7.2 What is Misconduct?	14
7.3 Can disciplinary action be taken if an officer or permanent employee has resigned or retired?	14
7.4 What is a Protected Disclosure?	15
7.5 What is an Internal Disclosure?	15
7.6 Procedural fairness	16
7.7 When must allegations of misconduct be externally notified?	16
7.8 What are the Stages in the Investigation and Disciplinary Process?	17
<b>8. Procedural Guidelines for Dealing with Unsatisfactory Performance .</b>	<b>35</b>
8.1 Responding to Unsatisfactory Performance	35
8.2 Performance Management	35
8.3 Consideration of organisational and non-work-related factors	36
8.4 Remedial vs Disciplinary Action	37
8.5 Procedural Fairness	37
8.6 Assistance in Applying the Guidelines	38
8.7 Performance Principles Generally	38
8.8 What happens to the officer or permanent employee if their performance has been assessed to be unsatisfactory?	40
8.9 What is the process for dealing with unsatisfactory performance following a performance improvement program?	40
8.10 How is the unsatisfactory performance of principals dealt with?	40

8.11 Determination about Appropriate Outcome (other than school principals)	41
8.12 Unsatisfactory performance resulting in disciplinary action	41
8.13 Unsatisfactory performance resulting in remedial action	43
<b>9. Guidelines for Dealing with a Serious_Criminal Offence.....</b>	<b>46</b>
9.1 Notification Requirements	46
9.2 Procedural Fairness	47
9.3 In what circumstances should consideration be given to removing the officer from duty following a criminal charge or criminal conviction?	47
9.4 At what point can the Department commence investigation of a criminal matter that directly relates to an officer or permanent employee's work?	48
9.5 Officer or permanent employee convicted of a Serious Offence	48
9.6 Termination of Employment of Prohibited Persons	51
<b>10. Sample Letters .....</b>	<b>55</b>
10.1 Initial notification letter –if no disciplinary action (Sample letter 1)	55
10.2 Direction to Alternative Duties (Sample letter 2)	57
10.3 Suspension from duty with or without pay (Sample letter 3)	59
10.4 Letter of Allegation proceeding to investigation (Sample letter 4)	60
10.5 Letter of allegation providing opportunity to respond (Sample letter 5)	62
10.6 Matter finalised no evidence or insufficient evidence (Sample letter 6)	64
10.7 Investigation finalised, misconduct proven, no action to be taken (Sample letter 7)	65
10.8 Investigation finalised, misconduct proven, remedial action (Sample letter 7A)	66
10.9 Investigation finalised, misconduct found – considering disciplinary action (Sample letter 8)	68
10.10 Final letter – misconduct proven final decision disciplinary action (Sample letter 9)	71
10.11 Letter advising possible disciplinary action following unsatisfactory performance (Sample letter 10)	73
10.12 Found performance unsatisfactory – considering disciplinary action (Sample letter 11)	75
10.13 Final decision disciplinary action to be taken re work performance (Sample letter 12)	78
10.14 Unsatisfactory performance resulting in remedial action (Sample letter 13)	80
10.15 Matter finalised following conviction for a serious offence – no disciplinary action (Sample letter 14)	82
10.16 Remedial action following conviction (Sample letter 15)	83
10.17 Disciplinary action being considered following conviction (Sample letter 16)	85
10.18 Timeframe letter to be sent after 18 weeks and then each 12 weeks (Sample letter 17)	88

# ***Guidelines for the Management of Conduct and Performance***

## **1. Legislative Scheme**

These Guidelines for the Management of Conduct and Performance are the 'Guidelines' specified in the *Education Legislation Amendment (Staff) Act 2006* (the 'Act'). This Act amends the:

- *Teaching Service Act 1980*
- *Technical and Further Education Commission Act 1990*, and
- *Education (School Administrative and Support Staff) Act 1987*

## **2. Application of Provisions**

### **2.1 Conduct and Performance Procedures**

The Act and the Guidelines for the Management of Conduct and Performance (the Guidelines) apply generally to:

- officers (i.e. permanent employees) who are employed by the Department of Education and Training under the *Teaching Service Act 1980*;
- members of staff (except those who are employed on a temporary or casual basis) who are employed under Chapter 1A of the *Public Sector Employment and Management Act 2002* in the TAFE Division of the Government Service; and
- persons who are permanently employed under the *Education (School Administrative and Support Staff) Act*.

They **do not** apply to administrative staff in TAFE (who are employed under the *Public Sector Employment and Management Act 2002*) or to public servants who are employed under the same legislation. Nor do they apply to persons who are employed on a probationary, temporary or casual basis.

### **2.2 Procedures relating to bankruptcy, private and secondary employment, prohibited persons and notification of serious criminal offences**

The provisions for dealing with prohibited persons, bankruptcy and private and secondary employment and notification of 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 Transitional Provisions

The Act contains transitional provisions.

Matters for which statutory disciplinary action has been completed under the applicable legislation will not be reinvestigated under this Act.

At the time of implementation of the Act, matters for which disciplinary charges have been issued against officers will continue under the unamended legislation.

Matters involving monitoring will effectively become remedial action involving monitoring under the new 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](#)
- [Complaints Handling Guidelines](#)
- *Serious Misconduct Investigation Manual*
- [Teacher Improvement Program](#)
- [Principal Improvement Program](#)
- [Procedures for Managing School Based Non-Teaching Staff Identified as Having Performance Difficulties](#)
- [Procedure For Managing Unsatisfactory Performance](#) (Staff employed under the TAFE Commission Division of the Public Sector Employment and Management Act (PSEM) 2002)

If there is any 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 shall prevail over the procedures.

# 3. Purpose and Operation

## 3.1 Policy Statement

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

- (a) to maintain appropriate standards of conduct and work related performance for officers in the Teaching Service, officers employed under Chapter 1A of the *Public Sector Employment and Management Act 2002* in the TAFE Division of the Government Service, and school administrative and support staff (SASS) ;
- (b) to protect and enhance the integrity and reputation of the respective employee groups; and
- (c) to ensure that the public interest is protected.

The protection of children is to be of paramount consideration:

- (a) in taking any action with respect to an officer or permanent or temporary employee under the Teaching Service Act and Education (School Administrative and Support Staff) Act or an officer or permanent employee in the TAFE Division of the Government Service where the conduct of the TAFE Division officer or employee relates to or involves children;
- (b) in dealing with any appeal against, or determining any claim with respect to that action.

This principle recognises the Department's duty of care towards children who attend schools and TAFE Institutes and the importance of ensuring a safe environment for students 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 Acts together with the legislative scheme and these Guidelines demonstrate the management of conduct and performance in the Department is consistent with the rules of procedural fairness. A dual approach is taken to the management of conduct and performance issues.

Performance issues, in particular, can be dealt with in a remedial framework, with disciplinary action being taken where there has not been satisfactory improvement.

The option to take remedial action, instead of disciplinary action, is also available in cases of misconduct and conviction of a serious offence at the discretion of the Director-General or delegate. It is important to apply a risk-based approach to managing issues of conduct and performance.

The approach taken in each case will depend on the nature and seriousness of the issue. Looking behind the issue, within the framework and scope of the allegation, can assist in deciding which approach to take. Each allegation of misconduct should be assessed and a considered decision should be made in deciding whether to take disciplinary or remedial action.

Importantly, if having decided that a disciplinary approach should be taken, and the facts of the matter later support a remedial approach, remedial action may be taken. Similarly, if having decided to take remedial action and further allegations of misconduct arise, the matter may be dealt with as a disciplinary matter.

Flexible options which incorporate support and assistance, provide officers and permanent employees with the opportunity to improve to an agreed performance standard. Where appropriate, remedial action may provide a better outcome for both the officer and the Department.

Discipline or review processes must be applied consistently without bias and each case should be considered upon its merits. The Acts provide a prescribed range of disciplinary options and an indicative range of options for remedial action.

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

The legislation and Guidelines also deal with officers, permanent employees or temporary employees who are found guilty of serious offences, including serious sex offences that would render that person prohibited to work in child related employment under the amended *Commission for Children and Young People Act 1998*. The legislation provides for the immediate dismissal of such persons who have effectively become a prohibited person to work in child-related employment as a result of being convicted of a serious sex offence.

## **4. Principles Underpinning the Guidelines**

A key tenet of the legislation and these Guidelines is that an officer or permanent employee is entitled to be treated fairly and transparently at every stage of the disciplinary process.

Investigations and disciplinary processes must be conducted according to the rules of procedural fairness.

### **4.1 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, reasonable delay may occur where another external investigating body, such as the Police, Department of Community Services (DoCS), NSW Ombudsman or Independent Commission Against Corruption (ICAC), 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 involved
- the need to seek external or internal expert advice
- the impact of delay on the fairness of the process, or matters arising from the process such as the suspension of the officer
- the health or well being of the officer or permanent employee.

### **4.2 Procedural fairness**

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

Procedural fairness serves an important function in the investigation of complaints by:

- providing a means of checking facts and identifying major issues;
- exposing weaknesses in the investigation; and
- informing the basis and direction of investigation.

A fundamental rule of procedural fairness is that a person be advised of the allegations against them and have an opportunity to reply to them.

This rule in relation to allegations of misconduct is reflected in section 93D and 93F of the *Teaching Service Act 1980*, section 22F and 22H of the *Technical and Further Education Commission Act 1990* and section 30 and 32 of the *Education (School Administrative and Support Staff) Act 1987*. The procedural guidelines are to ensure that an officer or permanent employee:

- to whom an allegation of misconduct relates is to be advised in writing of the alleged misconduct and that the allegation may lead to disciplinary action being taken;
- must be given an opportunity to respond to the allegation; and
- must be provided with a subsequent opportunity to make submissions in relation to disciplinary action that the decision maker is considering taking.

Further, the guidelines give an opportunity for the officer or permanent employee to request a meeting with the decision maker prior to a final decision on the action to be taken.

Procedural fairness also encompasses matters such as:

- making reasonable enquiries or investigations prior to making a decision; and
- ensuring that the decision maker has no direct interest and is unbiased in the matter.

The legislation specifically states that taking disciplinary action subsequent to an allegation of misconduct is not to entail a formal hearing with legal representation and the calling and cross-examination of witnesses (see section 93E of the *Teaching Service Act 1980*, section 22G of the *Technical and Further Education Commission Act 1990* and section 31 of the *Education (School Administrative and Support Staff) Act 1987*).

### **4.3 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 taken tailored to the individual matter. Only relevant factors must be taken into account and any irrelevant considerations must be disregarded.

This means that the same misconduct, unsatisfactory performance or serious offence conviction (unless it gives rise to a person becoming prohibited to work in child-related employment) will not necessarily lead to the same disciplinary or remedial



action being imposed. The circumstances of each case may be different. The relevance of the matter to the officer or permanent employee's position and duties may differ.

## 5 GLOSSARY/DICTIONARY

**The Acts** means the *Teaching Service Act 1980*, the *Technical and Further Education Commission Act 1990* and the *Education (School Administrative and Support Staff) Act 1987*

**The Amending Act** means the *Education Legislation Amendment (Staff) Act 2006*

**The Department**, unless otherwise specified, means the Department of Education and Training and the NSW TAFE Commission

**Decision maker** means the officer/s delegated by the Director-General to make certain decisions about remedial or disciplinary actions

**Delegated officer** means the officer/s delegated by the Director-General to undertake certain actions

**Director-General** means the Director-General of Education and Training

**Division Head** means the Division Head of staff employed in the TAFE Commission Division of the Government Service

**Disciplinary action** is defined in the Acts to include:

- dismissal from the Department;
- directing the officer or permanent employee to resign or to be allowed to resign from the Department within a specified time;
- reduction in the officer or permanent employee's salary or demotion to a lower position in the Department;
- the imposition of a fine;
- a caution or reprimand.

**Prohibited person** is defined in the Acts and has the same meaning as in Division 2 or Part 7 of the *Commission for Children and Young People Act 1998*, which includes a person who is convicted of a serious sex offence, the murder of a child, or a child-related personal violence offence or becomes subject to registration requirements under the *Child Protection (Offenders Registration) Act 2000*.

**Remedial action** is defined in the Acts and means any one or more of the following:

- counselling – informal and formal;
- training and development;
- monitoring the individual's conduct or performance;
- implementing a plan addressing unsatisfactory performance;
- the issuing of a warning that certain conduct is not acceptable or that the officer or permanent employee's performance is not satisfactory;

- a transfer to another position that does not involve a reduction in salary or demotion; or
- any other action of a similar nature, including mentoring, staff rotation, supervision or referral to relevant policies.

These arrangements allow an alternative to disciplinary action, where relevant and appropriate in the circumstances of the case, and particularly as a first intervention when dealing with unsatisfactory performance.

**Serious offence** is defined in the Acts and means 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).

## 6. Appropriate Use of Disciplinary or Remedial 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 officer or permanent employee has engaged in misconduct, where the imposition of remedial action is appropriate;
- when an officer or permanent employee has been found guilty of an offence.

Similarly, taking disciplinary action is relevant in the following circumstances:

- when the decision maker is of the opinion that the officer or permanent 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 officer or permanent employee has been found guilty of a serious offence, where it is appropriate.

### 6.1 Use of Disciplinary Options

The disciplinary options are:

- **Dismissal**

Dismissal should be regarded as the most serious option available.

- **Directing the officer or permanent employee to resign or to be allowed to resign**

This option should only be considered where a decision has been made that the officer or permanent employee should no longer be employed by the Department. This means that should the person not resign, termination is the only alternative.

- **Reduction of the officer or permanent 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 done in consultation with all affected parties.

- **The imposition of a fine**

The Acts provide that a fine may be imposed on an officer or permanent employee, including if he or she has voluntarily separated from the Department prior to completion of the disciplinary process.

- **A caution and/or reprimand**

All cautions and/or reprimands should where practicable be given face to face and at that meeting be confirmed in writing in the presence of an appropriate witness. The caution and/or reprimand should clearly state:

- the standard of conduct or performance that is required; and
- the possible consequences of a repetition of the conduct.

## 6.2 Use of remedial options

- **Counselling – informal and formal**

**Performance:** Informal counselling should be part of daily supervision and enables an early response to unsatisfactory performance.

Formal counselling would normally be required in situations where unsatisfactory performance continues or where it is beyond the scope of informal counselling.

**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 relevant to the area of performance or conduct targeted.

- **Monitoring the officer's conduct or performance**

This process enables on-going monitoring and feedback to the officer or

permanent employee. The process should be transparent with feedback being a key aspect to the process. Monitoring performance or conduct may highlight areas requiring development or training.

- **Implementing a Performance Improvement Plan**

Any performance improvement plan must comply with Departmental procedures e.g. see [Teacher Improvement Program](#). Where a performance improvement plan is proposed, there should be discussion between the relevant parties with agreement being reached where possible.

- **Issuing a warning**

Any warning needs to be specific about the conduct or performance that is not satisfactory and be clear as to what expectations there are in relation to ongoing conduct and performance. It should also indicate what assistance could be provided to the officer or permanent employee to enable him or her to meet the proper standard.

- **Transferring at current pay rate**

This is particularly relevant when there are reasons to believe that the issue is related to the officer or permanent employee's present work environment or that the work is outside the person's capability and that training and development will not be sufficient to remedy the problem. Transfer can offer the person a fresh start and removes him or her from the particular environment. 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.

- **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 understands the nature of the issue to be addressed and should be a role model in relation to the areas of concern.

- **Staff rotation**

This option may assist the officer or permanent 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 Director-General is to deal with alleged misconduct by an officer or permanent employee. The Director-General 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 dealing with misconduct 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 made.

Some matters will take longer to finalise for a range of reasons (N.B. [Section 4.1](#) of these Guidelines) but officers and permanent employees should be advised of allegations as soon as practicable.

Except as set out below, irrespective of the complexity of the matter, the Director-General or Division Head will, after 18 weeks from receipt of the allegations by the Director-General or Division Head, advise the officer or permanent employee who is the subject of the allegation(s) in writing (see [sample letter 17](#)) of the progress of the investigation, the anticipated time it is expected to conclude and outline the reasons for any delays to date and expected delays.

Reasons for a delay may include complexity of the matter, exceptional circumstances, a request for delay by an external investigating authority, or availability of the officer. Similar advice is to be sent each subsequent 12 weeks after the first advice.

For allegations of misconduct that also raise reportable allegations under the *Ombudsman Act 1974* or allegations of criminal conduct, irrespective of the complexity of the matter, the Director-General or Division Head will, after 18 weeks from the date when a decision is made to proceed with such allegations as allegations of misconduct, advise the officer who is the subject of the allegation(s) in writing (see [sample letter 17](#)) of the progress of the investigation and the anticipated time it is expected to conclude and outline the reasons for any delays to date or anticipated delays.

Reasons for a delay may include complexity of the matter, exceptional circumstances, a request for delay by an external investigating authority, or availability of the officer. Similar advice is to be sent each subsequent 12 weeks.

In any event, if a decision is made not to proceed with allegations of misconduct as a disciplinary matter, the officer or permanent employee will be advised of the allegations and the fact that they are not being proceeded with under these guidelines.

Any dispute that arises between the parties concerning the reasons for delay will be dealt with in accordance with the dispute resolution procedures in the relevant award.

## **7.2 What is Misconduct?**

Misconduct is defined in the Acts as:

- (a) a contravention of any provision of the respective Acts or regulations;
- (b) engaging in, or having engaged in, any conduct that justifies the taking of disciplinary action e.g. conduct that may be contrary to the *Code of Conduct* and/or other established policies of the Department;
- (c) taking any detrimental action (within the meaning of the *Protected Disclosures Act 1994*) against a person that is substantially in reprisal for the person making a protected disclosure within the meaning of that Act; or
- (d) taking any action against a person that is substantially in reprisal for an internal disclosure made by that person.

The Acts define misconduct as not only conduct that may have occurred while the officer or permanent employee is on duty but can relate to an incident or to conduct that happened while the officer was not on duty, or conduct that occurred before the officer or permanent employee was appointed to his or her position.

Consideration must be given to the objects of the Acts ([Section 3.1](#) of these Guidelines), the need to ensure that the protection of children is paramount, whether there is a relevant connection between the conduct and the officer's or permanent employee's position and duties, and to the circumstances surrounding the conduct, including whether there are other options that might be appropriately applied such as referrals to other services.

The term "misconduct" applies to many different factual situations but usually involves deliberate acts.

## **7.3 Can disciplinary action be taken if an officer or permanent employee has resigned or retired?**

Yes. The Acts provide that a reference to a resignation is a reference to a resignation that has been **accepted** by the Director-General or Division Head of the TAFE Division of the Government Services as appropriate.

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 officer or permanent employee may be likely to return to teaching or other child-related employment at some future date;
- the practicality of access to the former officer or permanent employee; and
- 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 officer's or permanent 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 officer or permanent employee seeks to resign or medically retire prior to the completion of any disciplinary process, the Director-General or Division Head has the power to refuse to accept the resignation or medical retirement.

#### **7.4 What is a Protected Disclosure?**

A protected disclosure is a disclosure made within the meaning of the [Protected Disclosures Act 1994](#).

The object of the *Protected Disclosures Act 1994* is to encourage and facilitate a disclosure, made in the public interest, of corrupt conduct, maladministration and serious and substantial waste in the public sector. In this regard, s20(1) of that Act makes it a criminal offence to take "detrimental" action against another person that is substantially in reprisal for the other person making a protected disclosure. An offence against s20(1) of the *Protected Disclosures Act 1994* constitutes misconduct.

**Detrimental action** means action causing, comprising or involving any of the following:

- injury, damage or loss;
- intimidation or harassment;
- discrimination, disadvantage or adverse treatment in relation to employment;
- dismissal from, or prejudice in, employment; and
- disciplinary proceedings.

The onus of proof in relation to any proceedings for an offence against s20 requires the defendant to prove that detrimental action taken against a person was not substantially in reprisal for the person making a protected disclosure. This is a reversal of the usual standard, which requires the prosecution to prove the case.

#### **7.5 What is an Internal Disclosure?**

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

The Acts make clear that an internal disclosure for the purposes of the Acts means a disclosure made in good faith by a person regarding the alleged misconduct of another person.

## **7.6 Procedural fairness**

The Guidelines are subject to the rules of procedural fairness. Throughout the investigative and disciplinary process, the rules of procedural fairness must be followed.

The rules of procedural fairness are outlined at [section 4.2](#).

## **7.7 When must allegations of misconduct be externally notified?**

These Guidelines reflect the legislative requirements of the Department to report certain allegations of misconduct to the NSW Ombudsman, the Department of Community Services, the Police (if the allegations potentially constitute a criminal offence) and the Independent Commission Against Corruption (ICAC).

The outcomes of investigations of allegations of reportable conduct of a child protection nature against employees are also required to be reported to the Commission for Children and Young People (CCYP) if there is evidence or some evidence that reportable conduct may have occurred.

Certain external reporting requirements are outlined in the following documents:

[Responding to Allegations against Employees in the Area of Child Protection](#) – 23 April 2004

[Protecting and Supporting Children and Young People](#) – Revised Procedures (March 2010)

[Working With Children Check Guidelines](#) issued by the Commission for Children and Young People

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;
- sexual misconduct that involves children, is directed at children, or takes place in the presence of children;
- acts of violence committed by the employee in the course of employment which involves children, is directed at children, or takes place in the presence of children;
- certain criminal offences, including fraud;
- corrupt conduct.



## 7.8 What are the Stages in the Investigation and Disciplinary Process?

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

Stage 1 - Initial 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.

### 7.8.1 Stage 1 - Initial determination of an appropriate course of action when dealing with an allegation of possible misconduct

The Department has a number of procedures which must be followed in conjunction with these Guidelines when determining an appropriate course of action for responding to an allegation or incident of misconduct. These procedures differ depending on the type of allegation. Hyperlinks to the relevant procedures are provided.

If there is any 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 shall prevail over the procedures.

#### *Child Protection*

The process for determining an 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](#). These procedures clarify that the Director-General or delegate is required to respond to all allegations of a child protection nature against employees, either by conducting an investigation or undertaking local management procedures. (For the purposes of these Guidelines – local management procedures are not considered to be an investigation.) All allegations against employees of a child protection nature must be immediately notified to the Employee Performance and Conduct Directorate (EPAC) Ph: 9266 8070, which will determine the appropriate process for dealing with the allegation.

If these allegations constitute “reportable conduct” (as defined by the *Ombudsman Act* and *Commission for Children and Young People Act*, these allegations must also be reported to the NSW Ombudsman’s Office.

#### *Corrupt or Fraudulent Conduct*

The ***Serious Misconduct Investigation Manual*** outlines the investigation process for misconduct matters that may comprise corrupt or fraudulent conduct.

## *Other Allegations*

For all other allegations of misconduct the process for determining an appropriate course of action is outlined in the investigation model in the policy document [Complaints Handling Guidelines](#). This document identifies the officers or permanent employees to whom allegations are referred.

When an allegation of possible misconduct is made to the appropriate delegated officer (as defined in the [Complaints Handling Guidelines](#)), or he or she is made aware, or becomes aware, by any means, that an officer may have engaged in misconduct, that delegated officer may decide:

- to dismiss or take no further action in relation to the allegation or incident;
- to take no further action against the individual but to take general management action;
- to deal with the allegation by using the negotiation procedure outlined in [Complaints Handling Guidelines](#);
- to arrange for an investigation of the allegations; or
- to refer the matter to a decision maker to take appropriate action.

Although a decision maker may initially have decided to take remedial action, if it appears that the officer or permanent employee engaged in additional misconduct during that period, the decision maker may determine that the matters require investigation.

In deciding what action to take upon receiving an allegation, the delegated officer should assess the matter and consider the facts, seriousness and nature of the particular incident. This may be able to be done solely on the paperwork. Alternatively it may require an investigation.

If the officer or permanent employee the subject of the allegation is to be interviewed, the requirements under [section 7.8.2.2\(5\)](#) should apply. The officer or permanent employee must also be advised that the allegation if treated as a disciplinary matter may, if proven, result in disciplinary action. In such situations the officer or permanent employee must also be advised of the range of disciplinary actions to be considered. The person must be advised that anything said during the interview may be taken into consideration if the matter is subject to an investigation, and also by the decision maker if required to decide if the person has engaged in misconduct.

Consideration should be given to matters such as:

- the paramount consideration of the protection of children;
- whether it is an isolated incident;
- the seriousness of the incident;
- the age of the incident;
- the circumstances surrounding the incident;
- the employment history of the officer or permanent employee;

- the status of and position held by the officer or permanent employee;
- the reputation of the Department and the public sector; and
- the impact on the organisation and other employees.

Remedial action can be taken under the Acts if an allegation is made that an officer or permanent employee may have engaged in misconduct. A determination that misconduct has occurred does not have to be made for remedial action to be imposed by a decision maker.

The officer or permanent employee who is subject to the allegation must be advised in writing that remedial action is going to occur and the nature of that remedial action (see [sample letter 1](#)). If it is decided to treat the allegation as a disciplinary matter, the officer or permanent employee is to be advised in accordance with [section 7.8.2.2 \(4\)](#) of these Guidelines (see [sample letter 4](#)).

If the remedial action proposed is to transfer the officer or permanent employee to a location that would require the person to move residence, the decision maker must provide the person with the opportunity to provide a submission about their views of the transfer. The decision maker should be satisfied the officer or permanent employee has no valid reason for opposing the transfer.

### **7.8.2 Stage 2 – The Investigation Stage**

If a workplace manager determines that an allegation of possible misconduct requires an investigation, a suitably experienced and qualified person must be appointed to conduct an investigation. The conduct of an investigation will vary depending upon the particular case and its circumstances and the complexity or otherwise of the issues, incidents and facts of the matter. This step, like all in the process, should be completed in a timely and expeditious manner.

Any delays in the process should be appropriately recorded and monitored.

In those matters where either DoCS or NSW Police are investigating, the Department is usually required to wait for those agencies to complete their investigation or enquiries before commencing its own. In some cases a Departmental investigation will occur in conjunction with other agencies. Interagency liaison will occur to ensure that there is an appropriate response to meet the needs of all parties without undue delay. However the time taken to complete an investigation is sometimes outside the control of the Department.

Where a Departmental investigation needs to be deferred as the result of an investigation by external authorities, such as ICAC, NSW Ombudsman, or Police, the officer or permanent employees may continue working, be moved to another job or suspended with or without pay. The action taken, if any, will depend upon the particular circumstances.

All stages of dealing with the allegation should continue unless requested by the external authority to not proceed. If all stages are not completed and the officer or permanent employee is charged criminally it is usually appropriate to await the outcome of the court proceedings.

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

If the officer or permanent employee is charged with criminal offences it is usually appropriate to await the outcome of any court proceedings.

The Director-General, decision maker or notifying officer should not have any role in conducting the investigation or disciplinary process if they are the source of the initial allegation against the officer or permanent employee.

#### **7.8.2.1 What happens if an officer or permanent employee needs to be removed from duty during an investigation?**

Decisions in relation to this issue are to be based on the facts, nature and seriousness of the matter in the context of the officer's or permanent employee's position. The first consideration should be whether it is appropriate for the officer or permanent employee to continue in their usual duties.

In considering whether it is appropriate for an officer or permanent employee to remain on duty, a risk assessment should be undertaken. The risk assessment should consider the risk to any complainant or class of complainants or potential witnesses, the risk to the officer or permanent employee themselves, the risk to any investigation and the risk to the Department itself.

If the decision is that it is not feasible to manage identified risks while the officer or permanent employee remains on duty, the first option is to place him or her on alternative duties or duties at another location (see [sample letter 2](#)).

If a placement on alternative duties is not feasible and the alleged conduct is of a serious nature, the officer or permanent employee may be suspended from duty with pay (see [sample letter 3](#)). Such an option would only be considered in circumstances where an alternative duties placement could not be reasonably located. Alternative duties is the preferred option and any suspension with pay must be reviewed every 30 days.

If the officer or permanent employee has been charged with a serious criminal offence which if proven may result in imprisonment for 12 months or more, or which would upon conviction, result in the officer or permanent employee being classified as a prohibited person, he or she may be suspended from duty without pay. Such a decision should be made in accordance with the [Premier's Memorandum 94-35](#) which states that suspension without pay should only occur in exceptional circumstances such as those outlined above (see [sample letter 3](#)).

This decision must be reviewed at least every 30 days.

Suspension is **not** one of the disciplinary options available, following a finding that misconduct has occurred. It is a protective measure while the disciplinary process is being undertaken.

It should be noted that an officer or permanent 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 Director-General or Division Head otherwise directs, or the salary was due to the officer or permanent employee in respect to a period before the suspension was imposed.

The position of a suspended officer or permanent employee shall not be permanently filled while they are on suspension.

If no disciplinary action is taken against the officer or permanent employee or he or she is found not guilty in relation to a criminal matter, he or she will be paid the salary that was withheld.

### **7.8.2.2 What happens during an Investigation?**

As outlined in [section 7.8.1](#), the Department has procedures in place for dealing with allegations of different types of misconduct and undertaking investigations where required.

However there are common procedural requirements which should be adhered to when undertaking an investigation. These include:

#### **1. The investigation shall be conducted by an appropriate investigator/s.**

The investigator/s should:

- understand the investigation process;
- have no direct involvement with the matter subject to investigation – that is, be free from actual or perceived bias;
- have no personal involvement or friendship with the officer or permanent employee who is subject to the allegation/s;
- be objective and not prejudge the matter; and
- be suitably experienced and qualified to undertake the investigation.

#### **2. The investigation should be conducted in a confidential manner.**

Confidential information obtained during the investigation should not be disclosed except for the purpose of the investigation or any action arising from the investigation, or for the purpose of obtaining advice from the relevant union and/or a legal representative. This is to protect the integrity of the process and where child protection principles or any other legal requirement permit, the privacy rights of the person concerned.

Similarly, all witnesses, including the officer or permanent employee the subject of the investigation and his or her support person, should be advised

that they should maintain confidentiality and not discuss the matter except for the purposes of the investigation or to meet their personal health or support needs.

If a witness informs the investigator at any time that he or she is being victimised or harassed by the officer who is the subject of a misconduct investigation, the investigator should refer them to the Department's [Complaints Handling Guidelines](#) policy and report the allegation in writing to the appropriate delegated officer.

### **3. The absence of the officer or permanent employee should not preclude investigation**

The investigation may only be conducted in the absence of the officer or permanent employee if:

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

### **4. Allegations must be put to the officer or permanent employee subject to the investigation and the officer or permanent employee must be provided with an opportunity to respond to the allegations.**

The officer or permanent employee subject to the allegations must be informed about an investigation as soon as practical (see [sample letter 4](#)).

The officer or permanent employee will be advised, in writing, of the specific details of the allegation/s (details as known at that point in time subject to concerns as outlined below) as soon as practicable, having regard to the nature and circumstances of the matter. This requires sufficient detail to enable an accurate response. The letter should also give such relevant information that will fairly enable the officer to respond – this might include the date, time, location and details of the alleged incident. The officer or permanent employee should also be advised that the allegation if proven, may result in disciplinary action. This should occur as soon as it is clear what the allegations are (see [sample letter 5](#)).

It may not be possible to put detailed allegations to the officer or permanent employee until after interviews with any witnesses are conducted and the allegations are clarified (see [section 7.8.2.2. \(6\)](#) – General conduct of interviews).

Where the Department Head is reasonably concerned that the nature of the allegation or circumstances surrounding the matter may lead to the destruction of evidence, harassment or victimisation of suspected

complainants it may be appropriate that allegation/s is not provided at first instance.

The officer or permanent employee will be given a period of no less than 14 days in which to respond to specific allegations or they may request an interview. This allows them to get appropriate support and advice.

The officer or permanent employee is to be advised that he/she may also bring any written submissions to any interview that takes place and is to be given 7 days (or longer in complex matters) from the 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 the need to ensure procedural fairness. If no response is forthcoming or if the officer states that they do not intend to respond, it will be deemed that the allegations have been denied.

The officer or permanent employee should also be advised that the allegation if proven, may result in disciplinary action.

## **5. Notification and advice of interview**

An officer or permanent employee against whom misconduct is alleged, who agrees to an interview as part of the investigation must be provided with:

- at least 24 hours notice of the interview;
- notification of the time, date, location, nature and purpose of the interview and the name/s of the officer/s conducting the interview;
- advice about how to access the Guidelines on the Department's website;
- the allegations it is intended to canvass at the interview, to the extent that the allegations are clearly known at this time. If the matter concerns a protected disclosure the identity of the person who made the disclosure is only to be revealed if it is essential for procedural fairness i.e. for the officer or permanent employee against whom misconduct is alleged, to be able to respond to the allegations;
- the opportunity to make comment on any relevant issue, and to give his or her version of the relevant event/s;
- advice that a support person may be present. It is not appropriate to have a representative or observer who has been involved in the matter, or whose availability would mean an unreasonable delay in the matter proceeding;
- advice that the role of the support person is as a witness or adviser and not as an advocate, and that their presence is a safeguard against unfair practices;
- advice that the officer or permanent employee may nominate a person to speak on his or her behalf. This applies if the investigator has reason to

believe that the officer or permanent employee does not have the capacity to speak effectively or to understand the implications of the interview. Such persons will normally be another officer or union representative but shall not be a legal advocate. A language or signing interpreter should be used if the officer or permanent employee has language or hearing difficulties;

- advice that a copy of the record of interview (either a tape or transcript) will be provided upon request;
- advice that any admissions made will be taken into account should the matter proceed to be dealt with as a disciplinary matter.

## **6. General conduct of interviews (with the consent of the officer or permanent employee)**

Not all investigations will require interviews to be conducted prior to a response being sought from the officer or permanent employee. Interviews will depend on the nature of the misconduct, the sources of evidence, the availability of witnesses and the willingness of the person subject to the allegations to be interviewed.

If an officer or permanent employee subject to an allegation wishes to be interviewed, they may have a support person of their choice present and the investigator will explain the support person's role. The support person may be a representative of the officer's or permanent employee's union, a colleague, family member or a legal representative. However the support person may not act as a legal advocate or cross examine the investigator during the interview.

The interviewer will reiterate that the role of the support person is that of witness to the interview or adviser and not of advocate, and that their presence is a safeguard against unfair practices.

The officer or permanent employee will be informed of their rights and provided with information about the investigation process. They will be advised about the purpose of the interview.

The officer or permanent employee will be advised that he or she will have an opportunity to fully respond to the questions asked and to provide comments with respect to relevant issues, which includes providing their understanding of the events in question.

Other people may have to be interviewed as part of the process. This may include alleged victims or potential witnesses. They will be advised at interview that the information they provide may be disclosed to the person the subject of the investigation and/or they may be required to give evidence at any appeal or review, should a matter proceed to that stage.



Procedural information will be provided to ensure witnesses understand the implications of providing information to the investigator. A support person may be present. The role of the support person is as a witness or adviser. This may be a union representative or a legal representative but the support person may not operate as a legal advocate and may not cross examine the investigator.

Interviews will be conducted in private. The investigators must be fair, courteous and impartial.

An audio recording device will generally be used to record interviews and a copy of the record or transcript offered. However, this is subject to permission being given by the interviewee for an electronic record. In the cases where interviews are not recorded, notes will be taken. A copy of any interview transcript or notes should be offered to the interviewee.

A statement may be sought from an interviewee. If a statement is prepared, a copy will be offered to the interviewee.

## **7. Commencing an interview**

The investigator must:

- advise the officer or permanent employee that the interview will be recorded. Sound recording can be suspended temporarily and replaced by note taking upon request;
- advise the officer or permanent employee of the purpose of the interview;
- clarify the role of the support person;
- advise the support person that they can request a halt to the interview if they wish to speak privately to the officer;
- advise the officer or permanent employee that any admissions made may be used in the decision making process;
- advise the officer or permanent employee that he or she will have an opportunity to respond to the questions asked and to provide comments about relevant issues, including providing their version of events.

## **8. During the interview**

The investigator must:

- put each particular of the allegation/s to the officer or permanent employee and invite him or her to respond;
- clarify their response or any other matters relating to the allegation/s;
- avoid accusatory or intimidatory language or tone of voice;
- avoid making comments about the answer given;
- not indicate personal views or the views of other people;

- ask the officer or permanent employee if there is anything else they wish to say.

## **9. Concluding the interview**

The investigator should not indicate that any view has been formed. The investigator must advise the officer or permanent employee:

- that following the completion of the investigation an investigation report will be prepared;
- a decision will be made on the facts and information contained in the investigation report;
- that the officer or permanent employee will be advised in writing of the outcome and where misconduct is established, the proposed action to be taken;
- if disciplinary action is being considered that they will receive a full copy of the investigation report subject to any legislative or confidentiality requirements precluding disclosure;
- that he or she will have an opportunity to make a submission to the decision maker in relation to any proposed disciplinary action before it is implemented. The submission may include comments on the investigation report and if applicable, on the opinion that misconduct has occurred. Also, the officer may request an interview with the decision maker accompanied by a support person.
- that they will be provided with a copy of the interview transcript or the tape.
- if applicable, that the officer or permanent employee should advise the investigator if the record of interview is not agreed to and the basis for disagreement. If the record of interview is transcribed, the officer or permanent employee can seek changes to the written document. If the investigator does not agree to the changes, the requested changes and the reasons for not agreeing to the changes must be recorded.

## **10. Collection of additional evidence**

Other sources of evidence may be sought if the investigator assesses that the investigation must rely on evidence other than witnesses.

These may include:

- documentary evidence such as photographs, emails and workplace records;
- site inspections;
- expert evidence such as technical and forensic evidence.

## 11. Managing victimisation or harassment

If a witness informs the investigator that they are being victimised or harassed by the officer or permanent employee who is the subject of an investigation, the investigator should:

- inform the witness that they are not required to speak to the officer or permanent employee and that the alleged victimisation/harassment should be reported to the appropriate delegated officer under [Complaints Handling Guidelines](#)
- not attempt to inquire into any such allegation because it is a separate matter and requires independent consideration; and
- report the allegation in writing to the delegated officer, so that the complaint can be managed.

## 12. Preparation of the Investigation Report

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

The investigator should prepare an Investigation Report that:

- consolidates all the material gathered during the investigation process;
- details the allegation/s involving the officer or permanent 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 officer or permanent employee has engaged in the alleged conduct, referring to material upon which the view is based;
- provides an assessment of whether the conduct appears to constitute misconduct if the investigator believes that the conduct as alleged has occurred;
- sets out the investigator's recommendation, if appropriate, on whether the matter should be treated as a disciplinary matter, including any comment on systemic or operational matters that need to be addressed;
- includes all relevant attachments, such as correspondence with the officer or permanent employee, disciplinary and other interviews, and witness statement/s.

## 13. Finalisation of the investigation

If the investigator is satisfied that the facts do not support the allegation of misconduct, a recommendation that the matter be dismissed or no further

action be taken should be forwarded to the investigator's workplace manager or supervisor.

If the workplace manager 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 officer or permanent employee will be advised that the allegation/s is not sustained and that no action will be taken. The complainant is also advised of the outcome of the investigation.

If the investigation sustains the allegations, the report and any supplementary evidence must be forwarded to the decision maker to determine any further action. The decision maker must hold a delegation under section 93F of the *Teaching Service Act 1980*, section 22H of the *Technical and Further Education Commission Act 1990* and/or section 32 of the *Education (School Administrative and Support Staff) Act 1987*, as appropriate.

### **7.8.3 Stage 3 - Determination about Appropriate Outcome by Decision Maker**

#### **7.8.3.1 How does the Decision Maker Form an Opinion about Whether Misconduct has Occurred?**

In forming an opinion of whether the officer or permanent employee has engaged in misconduct, the decision maker will have access to the investigation report, and any supporting evidence or material underpinning the report.

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 but any final opinion must be the responsibility of the decision maker. Should it be necessary to put further allegations to the officer or permanent employee, the above process must be followed.

In determining whether misconduct has occurred the decision maker must consider:

- the investigation report and supporting documentation;
- the officer or permanent employee's response and any supporting documentation (including any interview).

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. The question for the decision maker is whether the person has engaged in misconduct, not merely whether the facts set out in each particular have been established. It is open for 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 each and every one of the particulars of the allegation have been found proven.

The Department bears the onus of proving that the officer or permanent employee engaged in misconduct as alleged. The standard of proof required is that required in civil proceedings. That is, the decision maker may find the allegation of misconduct proved only if he or she is satisfied of the relevant facts on the balance of

probabilities. This is a lower standard of proof than the criminal standard of 'beyond reasonable doubt'.

In relation to an allegation of misconduct where the potential findings against an officer or permanent employee or the consequences for that officer or employee are serious (i.e. they may result in dismissal of the officer or permanent employee) the decision maker should ensure that he or she 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."*)

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

#### **7.8.3.2 If Misconduct is 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 officer or permanent employee and the complainant (where appropriate) in writing (see [sample letter 6](#)).

The materials in relation to the matter including the investigation report, are to be removed from any records or files held as to the individual officer or permanent employee (personnel files) but such records should be kept elsewhere. They should not be destroyed but retained consistent with the *State Records Act*. For example, all records of child protection investigations are retained by EPAC under restricted access.

#### **7.8.3.3 If Misconduct is found**

The decision maker, when of the opinion the officer or permanent employee has engaged in misconduct, must exercise discretion in making a determination. In determining the appropriate course of action, the decision maker should not adopt a policy that a particular conduct will always attract the same punishment. Advice may be sought from specialists (Departmental and legal) prior to making a determination.

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

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

- dismiss the matter and/or take no further action;
- take no further action against the officer or permanent employee but to take management action to address any systems or organisational issues;
- take remedial action with respect to the officer or permanent employee;
- take disciplinary action against the officer or permanent employee;
- take both remedial and disciplinary action against the officer or permanent employee;
- refer the matter to the appropriate delegate for decision on disciplinary action, if the recommended disciplinary action may result in termination of the officer or permanent employee's employment.

#### **7.8.3.4 What issues should be considered when determining an appropriate course of action following a finding that misconduct is proven?**

The decision maker needs to consider:

- the facts of the case;
- the impact of the conduct on the objectives of the Acts (see [section 3.1](#) of these Guidelines);
- the nature and seriousness of the proven misconduct, including the effect and circumstance of the incident;
- whether the officer or permanent employee poses an ongoing risk to children;
- the degree of relevance of the conduct matter to the officer or permanent employee's position and duties;
- the employment history and general conduct history of the officer or permanent 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 or required to be followed;
- mitigating or extenuating circumstances if available at this stage;
- any personal circumstances of the officer or permanent employee and whether these may have contributed to any misconduct e.g. health issues, particular stressors on the officer or permanent employee;
- the effect of the proposed action on the officer or permanent employee.

Matters outside the investigation report and supporting documentation, such as employment records, monitoring programs and substantiated disciplinary matters may be taken into account when deciding whether disciplinary action is appropriate and if so what action should be taken.

### **7.8.3.5 Misconduct Proven – no further action**

If the decision maker is of the opinion the officer or permanent employee has engaged in misconduct but that no further action is to be taken given the facts of the particular case, or the trivial nature of the conduct found proven, the officer or permanent employee will be notified in writing of that opinion with details of the misconduct and the decision to take no further action (see [sample letter 7](#)).

### **7.8.3.6 Misconduct Proven – remedial action**

If the decision maker is of the opinion the officer or permanent employee has engaged in misconduct but that remedial action is appropriate given the substantiated allegations in the particular case, the person must be notified in writing of that opinion with details of the misconduct and the remedial action to be taken (see [sample letter 7A](#)).

Remedial action is defined in [section 6.2](#) and can constitute one or more of the following:

- counselling;
- training and development;
- monitoring the officer or permanent employee's conduct or performance;
- implementing a plan addressing unsatisfactory performance where performance issues are assessed as having contributed to the misconduct;
- issuing a warning to the officer or permanent employee that certain conduct is unacceptable or that his or her performance is not satisfactory;
- transferring the officer or permanent employee to another position of a like nature that does not involve a reduction of salary or demotion. (A change of location that involves a change of the officer or permanent employee's residence, requires the person being given an opportunity to make a submission prior to the final decision being made. The decision maker should be satisfied that the officer or permanent employee has no valid reason for opposing the transfer);
- any other action of a similar nature.

### **7.8.3.7 Misconduct Proven – disciplinary action**

If the decision maker has determined that on the balance of the probabilities an officer or permanent employee has engaged in misconduct and that disciplinary action may be appropriate, he or she must be notified in writing of that opinion (see [sample letter 8](#)).

The written notification must include:

- the details of the misconduct that the decision maker is of the opinion the officer or permanent employee has engaged in;
- the full investigation report with all supporting attachments, subject to any legislative or confidentiality requirements precluding disclosure. (If the matter concerns a Protected Disclosure or confidentiality the identity of the person

who made the disclosure is only to be revealed in the investigation report if it is essential having regard to the principles of procedural fairness – that is, essential for the person to be able to respond to the allegation);

- an outline of the disciplinary action that the decision maker is considering imposing or recommending, including the severest disciplinary action that is being considered for the particular matter. In particular the officer must be advised if dismissal, or a direction to resign is being considered;
- any previous employment matters (such as past remedial actions, monitoring programs, or discipline matters or alternatively previous satisfactory work history) to be taken into account;
- the advice that the officer or permanent employee has 14 days from the receipt of the written notice to make a submission and to provide any additional information which he or she considers should be taken into account in relation to the disciplinary action being considered before a final decision is made. The officer or permanent employee's submission may address such matters including the finding of the decision maker that he or she has engaged in misconduct, the findings of the investigation report or any extenuating and mitigating circumstances. The decision maker shall also consider any submission made on behalf of the officer by the union.
- the decision maker has the discretion to extend the period for response, having regard to the overall circumstances and the need to ensure procedural fairness, if the officer or permanent employee applies for additional time and provides reasonable grounds for seeking the extension.
- the advice that the officer or permanent employee will be given an opportunity to have an interview with the final decision maker, accompanied by a union or other representative (not taking a legal advocacy role) before a final decision is made. The support person may speak on behalf of the officer but may not cross-examine the decision maker. A request for an interview should be made within 7 days of receipt of the written response.
- the interview is not 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 determine the appropriateness of a particular disciplinary action.
- the advice that these further submissions and/or additional information will be considered before a final decision is made to implement the disciplinary action being considered.

Each step in the disciplinary process must be taken and documented before the decision maker may make a final decision. It is essential that the decision maker's consideration of the most severe disciplinary action, must not involve any pre-judgement as to what disciplinary action, if any, is ultimately applied to the officer.

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 officer or permanent employee.



In determining disciplinary action, the decision maker should consider the same issues outlined in [section 7.8.3.4](#).

The disciplinary action that may be considered by the decision maker includes:

- a caution or reprimand;
- the imposition of a fine;
- reduction of the officer or permanent employee's salary or demotion to a lower position;
- directing the officer or permanent employee to resign, or to be allowed to resign within a specified period;
- dismissal.

The decision maker is not precluded at this stage from ordering remedial action in conjunction with disciplinary action. For example, a decision maker may consider that an officer or permanent employee should be reprimanded for their conduct, transferred to another school and directed to undertake training in certain policies relating to the area of misconduct.

If the disciplinary action **does not** involve removal of the officer or permanent employee from employment, the delegated decision maker will determine the disciplinary action and advise the person in writing of that determination.

If the disciplinary action may involve removal of the officer or permanent employee from employment, a recommendation will be forwarded to a senior officer who is the delegated decision maker for disciplinary action that involves termination of employment. Any requested interview will be held with the final decision maker.

The officer or permanent 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 (see [sample letter 9](#)).

All stages including the determination stage must be made in a timely and expeditious fashion.

#### **7.8.4 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 officer or permanent employee who is subject to the allegations, the investigator and the decision maker.

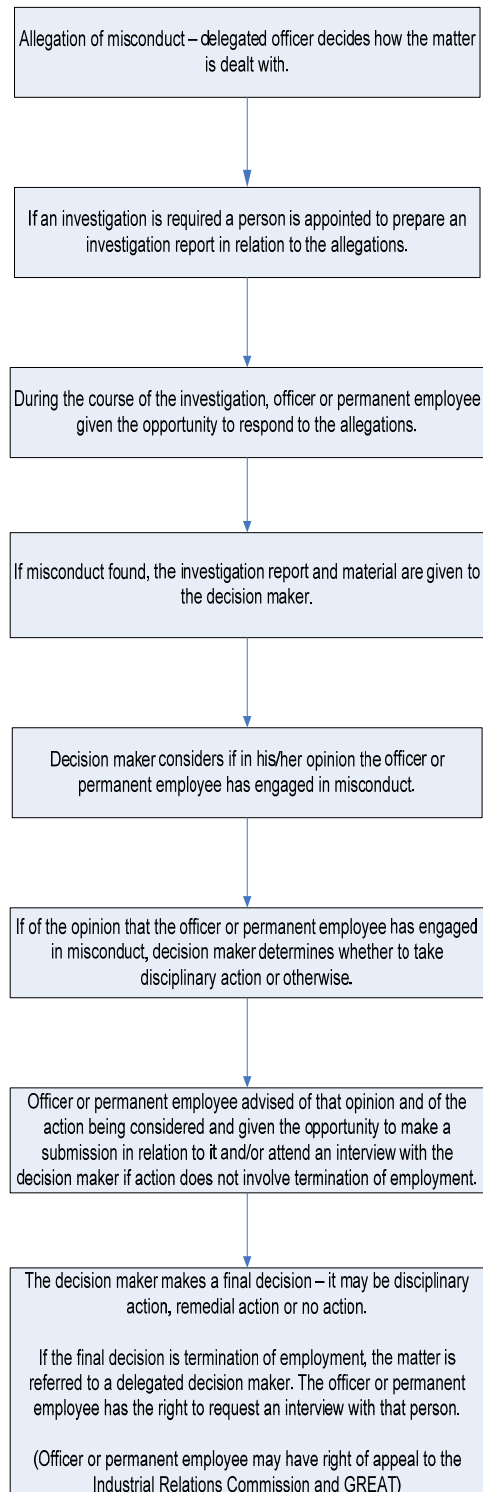
#### **7.8.5 Rights of appeal**

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

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

Commission, the Government and Related Employees Appeal Tribunal (GREAT) or other appropriate body.

## Disciplinary Process



## 8. Procedural Guidelines for Dealing with Unsatisfactory Performance

The legislation provides for:

- persons permanently employed under the SASS Act or who are permanent employees of the TAFE Division of the Government Service to have their performance reviewed periodically;
- officers or permanent employees employed under the *Teaching Service Act* 1980 to have their performance reviewed at least annually;
- the performance review to be against established criteria;
- if following a review of performance the opinion is formed that the officer or permanent employee is not performing his or her duties in a satisfactory manner, a performance improvement program may be implemented;
- the person must participate in any such performance improvement program in the manner required by the program;
- the performance improvement program is to be on terms and is to be implemented for such period as the Director-General considers appropriate.

The Director-General will delegate his or her functions to deal with unsatisfactory performance to an officer who understands the process and has the resources available to him or her to carry out the delegated function.

### 8.1 Responding to Unsatisfactory Performance

Workplace managers are responsible for ensuring that officers or permanent employees under their control meet required work standards. It is important that officers or permanent 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 tasks, or timeframes or standards of work. The agreed standards can be in a work plan or in any other documentation. Any standard that is applied must be relevant to the officer or permanent employee's position description, duty statement or articulated criteria.

### 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 and probation programs;
- ensure there are clearly articulated work standards and performance requirements which are reasonable and attainable;
- provide development plans to assist the officer or permanent employee to reach expected work standards;
- ensure that there is a clear understanding of the work to be performed;
- ensure training and development opportunities, both on and off the job, are provided;

- remove barriers to effective performance.

In dealing with any instance of unsatisfactory performance the workplace manager should examine whether the following standard EEO measures have been implemented with respect to the officer or permanent employee:

- ensuring equitable allocation of work, acting in higher grade opportunities, if appropriate;
- appointing officers and permanent employees on their ability to perform the job;
- ensuring fair and equitable distribution of overtime and leave;
- ensuring fair performance assessment and development.

### **8.3 Consideration of organisational and non-work-related factors**

The workplace manager/supervisor must consider factors which may contribute to the unsatisfactory performance.

Factors contributing to poor performance may include:

- organisational factors (e.g. poorly managed restructuring; poor work and job design with subsequent lack of challenge in work; ineffective recruitment and selection resulting in a “mismatch” of people and jobs; inappropriate planning, resourcing and competing deadlines);
- management practices (e.g. inappropriate or unacceptable management approach; inconsistent application of performance standards; biases, changes in opinion or lack of care or commitment on the manager’s part);
- training and development needs (e.g. 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 (e.g. inadequate performance evaluation and feedback);
- social factors (e.g. disruptive personality clashes within the work environment);
- inappropriate work environment (e.g. occupational health and safety standards not being met; direct or indirect discrimination or workplace harassment); and
- personal issues (e.g. lack of motivation or commitment; health or other 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 needs to be identified and appropriate strategies developed, including implementation of an improvement program, to assist the officer or permanent employee deal with identified poor work performance.

Unsatisfactory performance should be dealt with by the workplace 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 officer or permanent employee and the manager or supervisor to be clear about the issues.

#### **8.4 Remedial vs Disciplinary Action**

Before implementing disciplinary action to deal with unsatisfactory performance, the workplace manager/supervisor must be satisfied that reasonable assistance has been provided to the officer or permanent employee through an improvement program to enable him or her to perform at the required standard.

The action taken in instances of unsatisfactory performance will be determined by what is reasonable in the circumstances including whether:

- the officer or permanent employee has key accountabilities or objectives that include performance criteria, standards and targets, and training and development plans;
- equal employment opportunities are available to the officer;
- organisational and non-work related reasons for unsatisfactory performance have reasonably been considered.

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

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

#### **8.5 Procedural Fairness**

The Guidelines are subject to the rules of procedural fairness as required by sections 93D (2) and (3) of the *Teaching Service Act*, sections 22F (2) and (3) of the *Technical and Further Education Commission Act* and sections 30 (2) and (3) of the *Education (School Administrative and Support Staff) Act*.

The officer or permanent employee must have:

- the opportunity to respond to the opinion of the decision maker that his or her performance is still unsatisfactory after remedial action (including an improvement program) has been taken and he or she has been given a reasonable opportunity to improve;
- a separate opportunity to make representations in relation to any disciplinary action being considered.

An officer or permanent employee the subject of these Guidelines should be provided with a copy of these Guidelines.

## **8.6 Assistance in Applying the Guidelines**

The decision maker may seek advice from relevant “experts” to assist in forming a view as to how the matter might proceed. Advice can be sought from EPAC or the relevant human resource manager.

## **8.7 Performance Principles Generally**

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

Improvement of performance and job satisfaction is the primary goal. Whilst remedial action will usually provide the desired results, it may be necessary to proceed with disciplinary action if the identified standards are not met and performance is still unsatisfactory. The process should also have regard to any relevant written documentation that may be in place.

Staff have a right to regular feedback about their performance.

The key stages for addressing unsatisfactory performance are:

- early intervention and informal counselling and support;
- undertaking a performance improvement program;
- undertaking disciplinary action or remedial action.

The primary responsibility for performance management is the officer or permanent employee’s manager/supervisor. Early and effective informal counselling in most cases should address an unsatisfactory performance problem. It is only if action under this stage, has failed to rectify the unsatisfactory performance that consideration needs be given to involving the subsequent stages. The officer or permanent employee should be given reasonable verbal or written notice of the time, place and purpose of the proposed informal counselling session.

At the outset of the session the manager will:

- outline the purpose of the discussion;
- clarify expectations.

Early and effective informal counselling in most cases will address a work performance problem and inform the employee that their poor work performance is unacceptable.

The manager/supervisor will also:

- confirm the standards and explain how the officer or permanent employee’s performance has differed from those standards by reference to the employees work examples or other relevant documentation;

- outline what she/he considers to be the applicable standards and explain how the officer or permanent employee's performance has departed from that standard with reference to the officer's work examples or other relevant documentation;
- provide an opportunity for the officer or permanent employee to respond to the manager's performance concerns;
- advise the officer or permanent employee of her or his right to use the Department's dispute resolution procedure if there is a disagreement.

The outcome of informal counselling should be agreed by the officer or permanent employee and their manager/supervisor. If the officer or permanent employee disagrees with the manager/supervisor's views on their work performance and/or proposals to improve work performance, they are to be informed of their right to use the Department's grievance and dispute resolution procedures. Any process for the management of performance would continue whilst the officer's grievance is considered and resolved.

Where there is no written correspondence following informal counselling, a diary note shall be made. The manager will advise her/his supervisor when informal counselling is being taken.

Early and effective informal counselling in most cases will address a work performance problem and inform the officer or permanent employee that their poor performance is unacceptable.

While it is always open to a workplace manager/supervisor to informally address performance issues with an officer or permanent employee, the Department has established processes for formally addressing unsatisfactory performance, should informal processes of support and remedial action not be successful. These are:

- [Teacher Improvement Program](#)
- [Principal Improvement Program](#)
- [Procedures for Managing School Based Non Teaching Staff Identified as Having Performance Difficulties](#)
- [Procedures for Managing Probationary Teachers](#)
- [Schedule 1, Performance Agreement, CEOs' Award](#)
- [Procedure For Managing Unsatisfactory Performance](#) (Staff employed under the TAFE Commission Division of the Public Sector Employment and Management Act (PSEM) 2002)

The procedures outlined in the above documents should be followed when considering the first two stages for addressing unsatisfactory performance. If at the end of a performance improvement program the officer or permanent employee's performance is assessed to be satisfactory, no further action is required other than the usual periodic reviews.

These Guidelines have been developed to focus on the third stage of addressing unsatisfactory performance - the disciplinary or remedial process.

### **8.8 What happens to the officer or permanent employee if their performance has been assessed to be unsatisfactory?**

If an officer or permanent 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.

### **8.9 What is the process for dealing with unsatisfactory performance following a performance improvement program?**

When the officer or permanent employee's performance has been assessed to be unsatisfactory following completion of a performance improvement program, the matter is forwarded for an independent review to determine whether the process used in the performance improvement program was appropriately followed. The review panel comprises two staff from different locations from the person's work location. The role of the panel is to determine that the process was followed according to the procedures. Their role is not to determine the merits of the matter.

If the panel determines that the procedures were not followed, the officer or permanent employee is returned to their position with no further action. If, following the person's return to their position, their performance is still assessed to be unsatisfactory, a new performance improvement program must be commenced in another school or TAFE site.

If the panel assesses that the process was conducted correctly, the panel report and all documentation is forwarded to a delegated decision maker.

### **8.10 How is the unsatisfactory performance of principals dealt with?**

If the Director-General or delegate 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 Director-General or delegate may:

- dismiss the school principal from the Teaching Service; or
- demote the school principal to a lower position in the Teaching Service.

Before taking any such action with respect to a school principal, the Director-General or delegate 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 Director-General in relation to the proposed action;



- take into consideration any written submissions received from the principal during that period.

### **8.11 Determination about Appropriate Outcome (other than school principals)**

All remedial and formal action contained in the Department's relevant improvement program and procedures as outlined in [section 8.7](#) must be exhausted before these guidelines apply.

If the performance of an officer or permanent 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 officer or permanent employee in writing that his or her performance remains unsatisfactory and that this assessment may lead to disciplinary action (see [sample letter 10](#)).

The notification should indicate:

- the details of the unsatisfactory performance against the criteria 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 officer has had to respond to the opinion about his/her performance;
- advice that the officer or permanent employee will be provided with an opportunity to provide a submission in relation to any proposed disciplinary action;
- the officer's response will be taken into consideration in deciding whether to take disciplinary action.

### **8.12 Unsatisfactory performance resulting in disciplinary action**

In making a decision about disciplinary action the decision maker must, prior to notifying the officer or permanent 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 paramount consideration of the protection of children;
- the facts of the matter;
- the impact of the unsatisfactory performance on the officer or permanent 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 officer or permanent employee;
- any mitigating or extenuating circumstances that may have contributed to performance difficulties;
- the employment history of the officer or permanent employee;
- whether the unsatisfactory performance has previously been the subject of counselling or previous remedial or disciplinary action; and
- the effect of the proposed action on the officer or permanent employee.

If the decision is to take disciplinary action the decision maker must write to the officer or permanent employee and include the following (see [sample letter 11](#)):

- the fact that the officer's response has been taken into account;
- the disciplinary action being considered, including the severest disciplinary action that is being considered for the particular matter. In particular the officer or permanent employee should be advised if a dismissal or a direction to resign is being considered;
- outline any previous employment matters (such as past remedial actions, monitoring programs or discipline matters or alternatively previous satisfactory work history) to be taken into account;
- advice that the officer or permanent employee has 21 days from the receipt of the letter to make a submission and to provide any additional information that he or she considers should be taken into account 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. The decision maker shall also consider any submission made on behalf of the officer or permanent employee by the union;
- that he or she may request an opportunity to have an interview with the decision maker, accompanied by a union or other representative (not in a legal advocacy role) before the decision is made. A request for an interview should be made within 7 days of receipt of the written notice. Generally the decision maker should arrange to have the interview held within 14 days of receipt of

the written response. The support person may speak on behalf of the officer but may not cross-examine the decision maker; and

- that these submissions and/or additional information will be considered before a decision is made to implement the disciplinary action being considered.

Each step outlined in the letter must be taken and documented before the decision maker makes a decision as to disciplinary action.

The disciplinary action that may be considered by the decision maker includes:

- a caution or reprimand;
- the imposition of a fine;
- reduction of the officer or permanent employee's salary or demotion to a lower position;
- directing the officer or permanent employee to resign, or to be allowed to resign within a specified period;
- dismissal.

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 8.10](#)).

Having considered any submission made by the officer or permanent employee, or after interviewing the person, the decision maker shall make a final decision promptly and expeditiously.

The officer or permanent 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 (see [sample letter 12](#)).

### **8.13 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 8.7](#) 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.

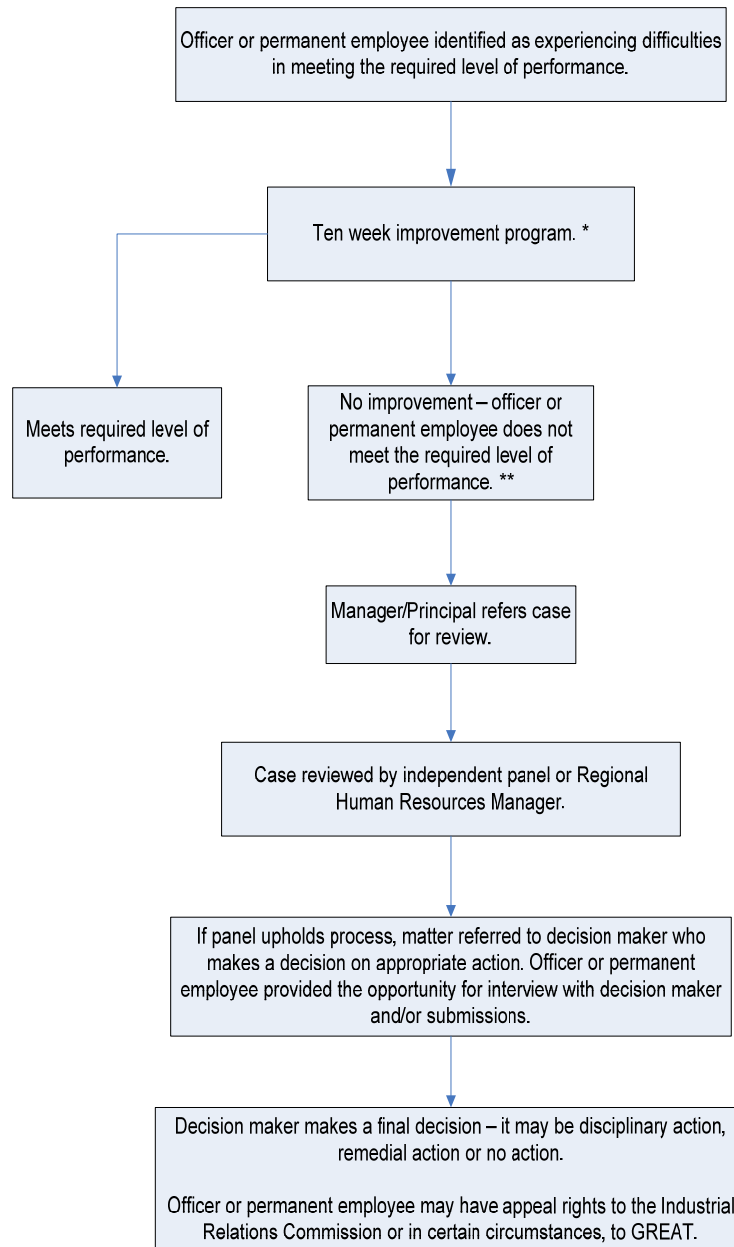
If the decision maker determines that remedial action is warranted, the officer or permanent employee should be advised in writing of (See [sample letter 13](#)):

- the remedial action proposed;
- the reasons for the decision;

- the consequences of the decision;
- a summary of the process taken to date;
- that continuing unsatisfactory performance may lead to disciplinary action;
- advice on how to access further assistance if required.

Where the proposed remedial action is the transfer to another position that would require the officer or permanent 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.

## Dealing with Unsatisfactory Performance



\* The program will not extend beyond twenty weeks for staff employed under the *Teaching Service Act 1980* who access leave during the ten week improvement program. A decision will be made at the conclusion of twenty weeks.

\*\* Staff employed under the *Technical and Further Education Commission Act 1990*, and under the *Education (School Administrative and Support Staff) Act 1987* are eligible for an extension of the Improvement Program up to six weeks.

## 9. Guidelines for Dealing with a Serious Criminal Offence

These Guidelines apply to situations in which:

- an officer, permanent employee or temporary employee is charged with a serious criminal offence (that is one punishable by imprisonment for 12 months or more);
- an officer or permanent employee is found guilty of such an offence; and
- an officer, permanent employee or temporary employee is found guilty (including entering a plea of guilt) of serious sex offences or offences against children that would render them prohibited to work in child related employment (as defined by the amended *Commission for Children and Young People Act 1998*).

The Director-General is responsible for taking action in respect of an officer or permanent employee found guilty of a serious offence. The Director-General may delegate these functions to an officer who understands the process of dealing with a criminal offence and who has the available resources to undertake the delegated function.

### 9.1 Notification Requirements

An officer, permanent 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 Director-General or Division Head respectively.

In the Department the role of receiving this information has been delegated to the workplace manager e.g. a teacher must advise their principal.

The workplace manager must immediately report that fact to the Employee Performance and Conduct Directorate or, if the person is employed in the TAFE Division of the Government Service, to the Institute Director.

If a senior officer or permanent employee in the branch or section in which the officer or permanent employee is employed, 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, he or she must report the matter as outlined above.

## 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 officer or permanent employee has been provided with the opportunity to make representations about any proposed disciplinary action.

The only exception to this will be in circumstances where the officer or permanent employee has been found guilty of a criminal offence that would render them prohibited to work in child-related employment.

## 9.3 In what circumstances should consideration be given to removing the officer from duty following a criminal charge or criminal conviction?

Decisions in relation to this issue are to be based on the facts as they are known at the time. This will include:

- the nature and seriousness of the criminal charge in the context of the officer or permanent employee's position;
- whether or not the person has made any admissions to the alleged offences;
- whether the person poses an unacceptable risk to a student or students.

The [Premier's Memorandum 94-35](#) states that if a decision is made that an officer or permanent employee must be removed from duties pending trial or further investigation, consideration should initially be given to whether he or she can be placed on alternative duties. This means that the officer or permanent employee retains their salary and conditions but is required to work on other duties, generally away from their usual work site.

When an officer or permanent employee has been charged with a serious offence the Director-General or Division Head may suspend him or her from duty until the criminal charge has been dealt with or until the Director-General or Division Head notifies the person that the suspension has been lifted, however this should only be done under exceptional circumstances as defined in the [Premier's Memorandum 94-35](#).

An officer or permanent employee can be suspended with or without pay. All decisions about suspensions must be reviewed every 30 days.

It should be noted that an officer or permanent employee suspended without pay will accrue salary during the period of suspension. The Director-General or Division Head determines whether or not this salary will be withheld.

Pursuant to the provisions of the Acts, any salary accrued for the suspension period is forfeited to the State unless the Director-General or Division Head directs otherwise.

If no disciplinary action is taken against the officer or permanent employee or the person is acquitted of the criminal matter, the person will be paid the salary that has been withheld.

The position of the officer or permanent employee shall not be permanently filled while the officer or permanent employee is suspended from duty.

Suspension is **not** one of the options available as disciplinary action but is a protective measure while the criminal charge is being considered.

#### **9.4 At what point can the Department commence investigation of a criminal matter that directly relates to an officer or permanent employee's work?**

The timing of conducting an internal investigation depends on the police investigation. Where the matter directly relates to the officer or permanent employee's work, there is usually no need unless requested by the Police to suspend the internal investigation concerning an allegation of misconduct under the Guidelines. All stages of dealing with the allegation as a disciplinary matter should continue unless requested by the external authority to not proceed. If the process is not completed and the officer or permanent 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 should ensure that it is aware of the progress of a matter and acts promptly upon conclusion of the criminal proceedings.

#### **9.5 Officer or permanent employee convicted of a Serious Offence**

When an officer or permanent 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 punishment, unless the offence renders the officer or permanent employee prohibited to work in child-related employment. It should not be assumed that all other convictions will result in either disciplinary or remedial action.

However if an officer or permanent employee becomes a Prohibited Person, his or her employment will be terminated effective from the date upon which he or she became a prohibited person. (This is further outlined in [section 9.6](#))

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

- the certificate of conviction;
- the Court's decision, which will outline findings made;
- where possible, a transcript of the Judge's/Magistrate's remarks in sentencing.



### **9.5.1 What issues should be considered in deciding the appropriate action**

In determining the appropriate action, the decision maker shall have regard to the objects of the legislation:

- to maintain appropriate standards of conduct and work-related performance for officers or permanent employees in the Department;
- to protect and enhance the integrity and reputation of the Department; and
- to ensure that the public interest is protected.

Issues to be considered include:

- whether the nature of the offence means that the officer or permanent employee poses an on-going risk to children;
- whether there is a relevant connection between the criminal matter and the officer or permanent employee's position and duties;
- the nature and seriousness of the offence;
- the employment history and general conduct of the officer or permanent employee;
- whether orders of the Court prevent the officer or permanent employee attending for work;
- issues taken into account in the judgement regarding mitigation or culpability which might be relevant to the officer or permanent employee's position and duties;
- the effect of the proposed action on the officer or permanent employee; and
- any mitigating or extenuating circumstances.

### **9.5.2 Decision Process**

#### **9.5.2.1 No action**

If the decision maker decides that no action is to be taken by the employer, the officer or permanent employee must be advised in writing of that decision (see [sample letter 14](#)).

#### **9.5.2.2 Remedial Action**

If the decision maker decides that remedial action is to be taken, the officer or permanent employee must be advised in writing of the details of the remedial action to be taken (see [sample letter 15](#)). Where the proposed remedial action is the transfer to another position that would require the person to change residence, then he or she 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 officer or permanent employee has no valid reason for opposing the transfer however the decision remains that of the decision maker.

#### **9.5.2.3 Disciplinary action proposed**

If the decision maker decides disciplinary action is appropriate, the officer or permanent employee must be notified in writing of that opinion and of the disciplinary action being considered, including the severest disciplinary action (see [sample letter](#)

[16](#)). Before any disciplinary action is taken, the officer or permanent 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 fact that the officer or permanent employee's response will be taken into account;
- the disciplinary action being considered, including the severest disciplinary action that is being considered for the particular matter. In particular the officer or permanent employee should be advised if dismissal or a direction to resign is being considered.
- outline the previous employment matters, if any, to be taken into account;
- other materials to be taken into account (e.g. certificate of conviction (if available), transcripts from criminal proceedings, other criminal convictions);
- that the officer or permanent employee has 14 days from the receipt of the written notice to make a submission and to provide any additional information which he or she considers should be taken into account in relation to the disciplinary action being considered before a final decision is made. The decision maker has the discretion to extend the period for response if the officer or permanent employee applies for additional time within the fourteen day period and provides reasonable grounds for seeking the extension. If made, the decision maker shall also consider any submission on behalf of the officer or permanent employee by the union.
- that he or she may request an opportunity to have an interview with the decision maker, accompanied by a union or other representative (not in a formal legal advocacy role) before a final decision is made. The request for an interview must be made within 7 days of receipt of the written notice. The officer or permanent employee's support person may speak on behalf of the person at interview but must not attempt to cross examine the decision maker.
- that these further submissions and/or additional information will be considered before a final decision is made to implement the disciplinary action being considered.

Each step outlined in the letter must be taken and documented before the decision maker may make a final decision.

#### **9.5.2.4 Disciplinary Action**

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 officer or permanent employee. The decision maker should make a final decision promptly and expeditiously.

In determining the disciplinary action to impose the decision maker should take account of similar issues considered when determining the appropriate course of action to respond to the criminal matters. These were outlined in [section 9.5.1](#).

The disciplinary actions that may be considered by the decision maker include:

- a caution or reprimand;
- the imposition of a fine;
- reduction of the officer or permanent employee's salary or demotion to a lower position;
- directing the officer or permanent employee to resign, or to be allowed to resign within a specified period;
- dismissal.

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

If the disciplinary action does not involve removal of the officer or permanent employee from employment, the delegated decision maker will determine the disciplinary action and advise the officer or permanent employee in writing of that determination (see [sample letter 9](#)). Such determinations should be made in a timely manner, preferably within 14 days of receiving the officer or permanent employee's submission.

The officer or permanent 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 Officer or Permanent Employee Found Not Guilty of a Serious Charge**

A "not" guilty finding or dismissal of the charge does not necessarily mean that the officer or permanent 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.

In particular if the criminal matter concerned conduct while on duty, or conduct that posed a risk to children, consideration would need to be given to whether there is sufficient reason to deal with the matter as an allegation of misconduct.

Similar considerations 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 would have elapsed for the criminal procedures.

## **9.6 Termination of Employment of Prohibited Persons**

The Acts provide for the immediate termination of employment of an officer, permanent employee or temporary employee who is or becomes a Prohibited Person and who is employed in the Department or the TAFE Division in child-related

employment as defined by the amended *Commission for Children and Young People Act 1998*.

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

### **9.6.1 Prohibited person status must be notified to Director-General or Division Head**

Similarly to any other charges or convictions, an officer or permanent employee or temporary employee who is charged with a serious offence that would render them prohibited to work in child-related employment or who becomes a Prohibited Person must immediately report that fact to the Director-General by contacting their workplace manager.

The workplace manager must notify the Employee Performance and Conduct Directorate of the officer or permanent or temporary employee's circumstances.

If a workplace manager or another senior officer becomes aware that an officer or temporary employee or permanent employee has been charged or convicted with such offences, and has not notified the Director-General or Division Head themselves, they must immediately notify the Employee Performance and Conduct Directorate.

### **9.6.2 What is the process for being dismissed following a person being deemed to be a prohibited person?**

The dismissal takes effect immediately:

- if the person becomes a Prohibited Person after being appointed as an officer or permanent employee or temporary employee;
- if the person was a Prohibited Person at the time of this Act coming into effect;
- if the person became a Prohibited Person after the commencement of the Act and before being appointed by the Department and the Director-General or Division Head subsequently becomes aware of the person's prohibited person status.

The dismissal takes effect immediately and the officer or permanent employee or temporary employee will not have a right to provide a written 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.

### **9.6.3 What happens if an employee ceases to be a Prohibited Person?**

A person can cease to be a Prohibited Person:

- if their conviction is overturned by a court of appeal; or

- if they successfully appeal their prohibited person status to the relevant tribunal.

### **9.6.3.1 What happens if the conviction is overturned?**

If a person ceases to be a Prohibited Person because the conviction for the offence in respect of which the person is a Prohibited Person is overturned by a court on appeal, the person is entitled to be reinstated to or re-employed in, a position that is similar to the position that the person held when the person's employment was terminated.

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.

Although the conviction may have been overturned in a court, the Department must still investigate whether any conduct may have occurred that would amount to misconduct under the Acts.

These Guidelines and relevant procedures would apply to any further investigation and/or disciplinary action that may need to occur. This may include placing a reinstated officer or permanent employee on alternative duties while further investigation occurs.

### **9.6.3.2 What happens if the conviction stands but the officer or permanent employee appeals their prohibited employment status?**

If a review application is made by a Prohibited Person who is an officer, permanent employee, temporary employee or former employee of the Department, the Commission for Children and Young People or the court or tribunal to which the application is made must notify the Director-General or Division Head of the application.

The Director-General or Division Head is able to appear, be represented and make submissions at any proceedings.

If the review application is successful and the officer or permanent employee ceases to be a prohibited person and a period of not more than 12 months has elapsed since the date of the person's termination from employment, he or she is entitled to be reinstated to, or re-employed in a position that is similar to the position held at the time their employment was terminated.

Following reinstatement, the officer or permanent employee 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.

There is nothing to prevent the Department dealing with any alleged misconduct that may arise out of the circumstances leading to the person becoming prohibited, under these guidelines.

The guidelines and relevant procedures would apply to any further investigation and/or disciplinary action that may need to occur. This may include placing a reinstated officer or permanent employee on alternative duties while further investigation occurs.

**9.6.4 Is an officer or permanent employee entitled to compensation or any industrial remedies for any action taken against them?**

The Industrial Relations Commission or any other court or tribunal does not have jurisdiction to order reinstatement or re-employment of an officer or permanent employee who has effectively been deemed to be a prohibited person.

No court or tribunal has the jurisdiction to order compensation for any action taken under Schedule 2 of the Act.

## 10. Sample Letters

### 10.1 Initial notification letter –if no disciplinary action (Sample letter 1)

To  
(Officer's name and address)

Dear

I have carefully considered an allegation of possible misconduct that was referred to me for consideration. The allegation was that you (*Specify the details of the misconduct*)

I have decided to take no further action in regard to the above allegation.

OR

I have decided to take remedial action as defined under (*choose appropriate legislation*);

Section 93B (1) of the *Teaching Service Act 1980*

OR

Section 22D (1) of the *Technical and Further Education Commission Act 1990*

OR

Section 28 (1) of the *Education (School Administration and Support Staff) Act 1987*

The remedial action I propose is (*select from the options below – may be more than one*):

- counselling
- training and development
- monitoring your conduct or performance
- implementing a plan addressing unsatisfactory performance
- the issuing of a warning to you that certain conduct is unacceptable or that your performance is not satisfactory

- transferring you to another position (*specify the position*), this does not involve a reduction of salary or demotion to a lower position<sup>1</sup>
- any other action of a similar nature. (*specify*)<sup>2</sup>

If you would like assistance at any time during this process, advice and support is available from

- Confidential counselling services are provided by the Employee Assistance Program Services. The service coordinators in your area are IPS Worldwide, Toll free: 1300 366 789 ([www.eap.com.au](http://www.eap.com.au)) and Davidson Trahaire Corpsych, Toll free: 1300 360 364 ([www.davcorp.com.au](http://www.davcorp.com.au)).
- Information about entitlements through the Staff Support Officer at the (xxxxx) Area Office;
- Welfare and other advice is also available from (*relevant union*).

Should you have any enquiries please contact (officer) on (*phone no*).

Yours sincerely

(*name*)

(*date*)

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<sup>1</sup> The officer must be provided with a minimum 14 days to provide a submission if this is the chosen remedial action.

<sup>2</sup> A comprehensive list is not included. Other actions **may** include, but is not limited to, mentoring, supervision or referral to appropriate policies.



## 10.2 Direction to Alternative Duties (Sample letter 2)

To  
(Officers name and address)

Dear

I wish to advise you that allegation(s) about your conduct has (have) been referred to  
*(relevant area of DET e.g. Audit, TAFE, Employee Performance and Conduct Directorate (EPAC)*

OR  
are currently being investigated by *(relevant area of DET e.g. Audit, TAFE, Employee Performance and Conduct Directorate (EPAC), etc* in accordance with the Guidelines for the Management of Conduct and Performance.

The information received relates to alleged *(state the conduct that may be the subject of investigation)*.

Ms / r (officer), (title) from *(section)* is investigating the matter and can be contacted on *(XXXXXXXXXX)* to answer any questions about the investigation process.

You do not have to make any comment about this matter unless you wish to do so.

However, in the circumstances, and following consultation with your *(Manager/Supervisor/Principal – as appropriate)*, I now direct you to undertake non-teaching alternative duties at *(location)*, as prescribed by, and under the supervision of *(name, title)*. You should report to *(name)* on *(location)* on *(start date)*. You will remain on alternative duties *(observing school hours and teaching conditions<sup>3</sup>)*, pending the outcome of the investigation or until further notice.

With respect to private or secondary employment with the Department (including TAFE) or the Office of the Board of Studies, any previous approvals are void and you must apply to me for approval before commencing or continuing such work.

You will be advised of the specific allegations and given an opportunity to respond orally or in writing to them as soon as possible.

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<sup>3</sup> Only for school based teachers

I have asked your (*Manager/Supervisor/Principal – as appropriate*) to give you this letter, respond to any questions you have and also explain what support is available to you.

If you would like assistance at any time during this process, advice and support is available from

- Confidential counselling services are provided by the Employee Assistance Program Services. The service coordinators in your area are IPS Worldwide, Toll free: 1300 366 789 ([www.eap.com.au](http://www.eap.com.au)) and Davidson Trahaire Corpsych, Toll free: 1300 360 364 ([www.davcorp.com.au](http://www.davcorp.com.au)).
- Information about entitlements through the Staff Support Officer at the (xxxxx) Area Office;
- Welfare and other advice is also available from (*relevant union*).

Please do not hesitate to contact Ms / r (*officer, title, phone*) if you have any questions.

Yours sincerely

(*name*)

(*date*)

### 10.3 Suspension from duty with or without pay (Sample letter 3)

To:  
(Officer's name and address)

Dear

I am advised that you (*describe the circumstances under which suspension without pay applies*).

You would appreciate that these are very serious matters, and I have given careful consideration to the circumstances.

In accordance with Premier's Memorandum 94-35, I hereby suspend you from duty effective from the date of this letter.

This suspension shall be *with/without* pay and shall remain in place until such time as this matter is resolved. The decision to suspend you will be reviewed every 30 days.

Until further notice you are directed not to seek casual or temporary employment or work in a voluntary capacity in any Departmental facility including TAFE or the Board of Studies. You are further directed not to visit any Departmental facility without seeking approval in writing from me.

Recognising that the receipt of this letter can be difficult for you, I remind you of the sources of support that are available to you:

- Confidential counselling services are provided by the Employee Assistance Program Services. The service coordinators in your area are IPS Worldwide, Toll free: 1300 366 789 ([www.eap.com.au](http://www.eap.com.au)) and Davidson Trahaire Corpsych, Toll free: 1300 360 364 ([www.davcorp.com.au](http://www.davcorp.com.au)).
- Information about entitlements through the Staff Support Officer at the (xxxxx) Area Office;
- Welfare and other advice is also available from (*relevant union*).

Should you wish to discuss this matter, please contact (*Name, title, phone*).

Yours sincerely

(*name*)  
(*date*)

#### 10.4 Letter of Allegation proceeding to investigation (Sample letter 4)

To  
(Officer's name and address)

Dear

I am writing to advise you that allegation(s) about your conduct *is / are* being investigated in accordance with the Guidelines for the Management of Conduct and Performance by

(relevant area of DET e.g. Audit, Employee Performance and Conduct Directorate (EPAC), TAFE)

The allegation (s) is/are as follows:

1. on ..... at ..... while ..... in response to ..... you ..... (specify the details of the allegations as known at the time).

I have requested (name of the investigator) to undertake an investigation into the allegation and prepare an Investigation Report on these matters.

You will be given an opportunity to respond to the allegation(s).

(Name of investigator) will contact you separately to make arrangements.

If the investigation sustains an allegation of misconduct, disciplinary or remedial action may be taken against you.

Possible disciplinary action may be taken as defined under (choose relevant legislation)

Section 93 B (1) of the *Teaching Service Act* 1980

OR

Section 22 D (1) of the *Technical and Further Education Commission Act* 1990

OR

Section 28 (1) of the *Education (School Administrative and Support Staff) Act* 1987.

I have asked your (Manager/Supervisor/Principal – as appropriate) to give you this letter, respond to any questions you have and also explain what support is available to you.

If you would like assistance at any time during this process, advice and support is available from

- Confidential counselling services are provided by the Employee Assistance Program Services. The service coordinators in your area are IPS Worldwide, Toll free: 1300 366 789 ([www.eap.com.au](http://www.eap.com.au)) and Davidson Trahaire Corpsych, Toll free: 1300 360 364 ([www.davcorp.com.au](http://www.davcorp.com.au)).
- Information about entitlements through the Staff Support Officer at the (xxxxx) Area Office;
- Welfare and other advice is also available from (*relevant union*).

Please do not hesitate to contact (*investigating officer, name title, phone*) who is available to provide advice about the process.

Yours sincerely

(*name*)

(*date*)

## 10.5 Letter of allegation providing opportunity to respond (Sample letter 5)

To  
(Officer's name and address)

Dear

I have been asked by (*name and title of decision maker*), to investigate and prepare an Investigation Report into allegation(s) that you may have engaged in misconduct.

The allegation(s) is/are:

1. on ..... at ..... while ..... in response to ..... you ..... (*specify the details of the allegations as known at the time*).

Section 93D(3)(a)(ii) of the *Teaching Service Act 1980*

OR

Section 22F(3)(a)(ii) of the *Technical and Further Education Commission Act 1990*

OR

Section 30(3)(a)(ii) of the *Education (School Administrative and Support Staff) Act 1987*

(Select relevant legislation)

requires you to be given an opportunity to respond to the allegation, and I would like to interview you as part of my investigation.

A copy of the *Guidelines for the Management of Conduct and Performance* can be accessed from the Department's *Our Policies* website.

Should you agree to be interviewed you will be provided with the opportunity to respond to questions asked in relation to the allegation/incident/s or make comments on these matters. You will be provided with at least 24 hours notice prior to interview.

You may wish to bring a support person to the interview. The role of the support person is as a witness or adviser. This person/s may not operate as a legal advocate and may not cross examine me.

The interview will be sound recorded (*if other method, specify which method*) and a copy of the record of interview statement or a tape will be provided to you.

If you would prefer to provide your response in writing, you may do so within fourteen (14) days of the date of this letter. A submission may also be made on your behalf by your union. If you have any enquiries in relation to this matter, please contact me on (*number*).

Should you require an extension of time to respond, I will consider any reasonable request.

Please note that if you or your union do not respond within 14 days, or indicate that you do not wish to respond, it will be deemed that you deny the allegation.

Should you agree to be interviewed please advise me if you have any special requirements such as access requirements or a signing or language interpreter.

If you would like assistance at any time during this process, advice and support is available from

- Confidential counselling services are provided by the Employee Assistance Program Services. The service coordinators in your area are IPS Worldwide, Toll free: 1300 366 789 ([www.eap.com.au](http://www.eap.com.au)) and Davidson Trahaire Corpsych, Toll free: 1300 360 364 ([www.davcorp.com.au](http://www.davcorp.com.au)).
- Information about entitlements through the Staff Support Officer at the (xxxxx) Area Office;
- Welfare and other advice is also available from (*relevant union*).

Please note that any response you provide may be considered should the allegation proceed to be dealt with as a disciplinary matter.

Yours sincerely

(*name*)

(*date*)

## 10.6 Matter finalised no evidence or insufficient evidence (Sample letter 6)

To  
(*Officer's name and address*)

Dear

I am writing to advise you that the investigation by (*relevant area of DET e.g. Audit, Employee Performance and Conduct Directorate (EPAC), TAFE etc<sup>4</sup>*) has been finalised.

All the information obtained, including your response has been carefully considered.

I have determined that there is no evidence that the alleged misconduct occurred. I have decided to dismiss the allegation.

OR

I have determined that, while an incident occurred, there is insufficient evidence to support that the allegations amounted to misconduct. No further action will be taken in relation to this matter.

(*I have requested your Principal/Supervisor to advise you of this outcome and for appropriate follow-up, which may include providing you with advice and support<sup>5</sup>*)

The materials in relation to this matter including the investigation report will not be placed on your personnel file.

If you would like assistance at any time during this process, advice and support is available from

- Confidential counselling services are provided by the Employee Assistance Program Services. The service coordinators in your area are IPS Worldwide, Toll free: 1300 366 789 ([www.eap.com.au](http://www.eap.com.au)) and Davidson Trahaire Corpsych, Toll free: 1300 360 364 ([www.davcorp.com.au](http://www.davcorp.com.au)).
- Information about entitlements through the Staff Support Officer at the (xxxxx) Area Office;
- Welfare and other advice is also available from (*relevant union*).

Should you have any enquiries please contact (*officer*) on (XXXXXXXXXX).

Yours sincerely  
(*name*)  
(*date*)

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<sup>4</sup> This letter may require tailoring to meet requirements of external agencies e.g. NSWOO require particular actions in relation to categories of finalisation of child protection matters.

<sup>5</sup> This paragraph may be required for follow up action by a principal or supervisor as required by the individual matter.



## 10.7 Investigation finalised, misconduct proven, no action to be taken (Sample letter 7)

To  
(Officer's name and address)

Dear

I am writing to advise you that the investigation by (*relevant area of DET e.g. Audit, Employee Performance and Conduct Directorate (EPAC), TAFE etc*<sup>6</sup>) has been finalised.

All the information obtained, including your response has been carefully considered.

I am of the opinion you have engaged in misconduct as follows:

*Specify the details of the misconduct that the decision maker is of the opinion the officer engaged in. These should be consistent with the allegation(s) first put to the officer.*

I have decided to take no further action in regard to the above misconduct.

If you would like assistance at any time during this process, advice and support is available from

- Confidential counselling services are provided by the Employee Assistance Program Services. The service coordinators in your area are IPS Worldwide, Toll free: 1300 366 789 ([www.eap.com.au](http://www.eap.com.au)) and Davidson Trahaire Corpsych, Toll free: 1300 360 364 ([www.davcorp.com.au](http://www.davcorp.com.au)).
- Information about entitlements through the Staff Support Officer at the (xxxxx) Area Office;
- Welfare and other advice is also available from (*relevant union*).

Should you have any enquiries please contact (officer) on (XXXXXXXX)

Yours sincerely

(name)  
(date)

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<sup>6</sup> This letter may require tailoring to meet requirements of external agencies e.g. NSWOO require particular actions in relation to categories of finalisation of child protection matters.

## 10.8 Investigation finalised, misconduct proven, remedial action (Sample letter 7A)

To  
(Officer's name and address)

Dear

I am writing to advise you that the investigation by (*relevant area of DET e.g. Audit, Employee Performance and Conduct Directorate (EPAC), TAFE etc<sup>7</sup>*) has been finalised.

All the information obtained, *including your response (OR submission OR the report provided by you)* has been carefully considered.

I am of the opinion you have engaged in misconduct as follows:

*Specify the details of the misconduct that the delegated officer/decision maker is of the opinion the officer engaged in. These should be consistent with the allegations first put to the officer.*

I have decided to take remedial action as defined under (*choose appropriate legislation*)

Section 93B (1) of the *Teaching Service Act 1980*

OR

Section 22D (1) of the *Technical and Further Education Commission Act 1990*

OR

Section 28 (1) of the *Education (School Administration and Support Staff) Act 1987*

The remedial action I propose is (*select from the options below – may be more than one*):

- counselling
- training and development
- monitoring your conduct or performance
- implementing a plan addressing unsatisfactory performance

---

<sup>7</sup> This letter may require tailoring to meet requirements of external agencies e.g. NSWOO require particular actions in relation to categories of finalisation of child protection matters.

- the issuing of a warning to you that certain conduct is unacceptable or that your performance is not satisfactory
- transferring you to another position (*specify the position*). This does not involve a reduction of salary or demotion to a lower position.

*(NB. If this option is chosen, the officer or permanent employee is to be given an opportunity to provide a submission regarding the transfer. The following wording is to be used:*

Prior to me making such a decision, you have the opportunity to show cause, via written submission, why such remedial action should not be taken. Any submission you wish to make should reach my office within fourteen (14) days of the date of this letter. Should your response not be provided within this time I shall proceed to make a decision in the absence of any further information you may wish to provide.)

- any other action of a similar nature.*(specify)*<sup>8</sup>

If you would like assistance at any time during this process, advice and support is available from

- Confidential counselling services are provided by the Employee Assistance Program Services. The service coordinators in your area are IPS Worldwide, Toll free: 1300 366 789 ([www.eap.com.au](http://www.eap.com.au)) and Davidson Trahaire Corpsych, Toll free: 1300 360 364 ([www.davcorp.com.au](http://www.davcorp.com.au)).
- Information about entitlements through the Staff Support Officer at the (xxxxx) Area Office;
- Welfare and other advice is also available from (*relevant union*).

Should you have any enquiries please contact (officer) on (XXXXXXXX)

Yours sincerely

(*name*) (*decision maker*)  
(*date*)

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<sup>8</sup> A comprehensive list is not included. Other actions **may** include, but is not limited to, mentoring, supervision or referral to appropriate policies.

## 10.9 Investigation finalised, misconduct found – considering disciplinary action (Sample letter 8)

To  
(Officer's name and address)

Dear

You are aware that allegation(s) made about your conduct have been investigated in accordance with the Guidelines for the Management of Conduct and Performance by .....(the Employee Performance and Conduct Directorate (EPAC), Audit, TAFE etc.) .

The investigation into the allegation you may have engaged in misconduct has now been completed.

I have considered the Investigation Report. A full copy including attachments is provided to you with this letter (see *Procedural Guidelines for guidance on information not to be disclosed*). I am of the opinion that you have engaged in misconduct as follows:

*Specify the details of misconduct that the Decision Maker is of the opinion the officer has engaged in - would be no more than details outlined in previous letter of allegation, although could be less*

I am now considering taking disciplinary action.

There are five (5) possible disciplinary actions ranging from a caution or reprimand to dismissal. These are:

- A caution or reprimand;
- The imposition of a fine;
- Reduction of the officer's salary or demotion to a lower position;
- Directing the officer to resign, or be allowed to resign within a specified period;
- Dismissal

In relation to this matter the severest disciplinary action I am contemplating imposing/recommending is:

*Need to advise severest penalty being considered for the particular matter. In particular the officer should be advised if dismissal, a direction to resign or annulment in the case of an officer on probation is being considered. If the choice is for a direction to resign, the officer should be advised of the consequences of not resigning within the time allowed – that is termination/dismissal*

You have 14 days from the receipt of this letter to make a submission and to provide any additional information which you consider should be taken into account in relation to the proposed disciplinary action being considered before I make a final decision. A submission may also be made on your behalf by your union.

Your submission may address such matters as my opinion that you have engaged in misconduct, the Investigation Report, or any extenuating and mitigating circumstances.

Before making a final decision on the appropriate disciplinary action, I will consider the following:

1. The Investigation Report
2. Your submission if made
3. The protection of children
4. The objectives of (choose relevant legislation)

Part 4A of the *Teaching Service Act* 1980 which are as follows:

- (a) to maintain appropriate standards of conduct and work-related performance for officers in the Teaching Service,
- (b) to protect and enhance the integrity and reputation of the Teaching Service,
- (c) to ensure that the public interest is protected.

OR

Part 6A of the *Technical and Further Education Commission Act* 1990 which are as follows:

- (a) to maintain appropriate standards of conduct and work-related performance for members of staff,
- (b) to protect and enhance the integrity and reputation of the TAFE Commission and staff members,
- (c) to ensure that the public interest is protected.

OR

Part 6 of the *Education (School Administrative and Support Staff) Act* 1987 which are as follows:

- (a) to maintain appropriate standards of conduct and work-related performance for permanent employees,
- (b) to protect and enhance the integrity and reputation of the school administrative and support staff of the Department,
- (c) to ensure that the public interest is protected.

5. The following matters:

*(Outline the previous employment matters such as past remedial actions, monitoring programs or discipline matters or alternatively previous satisfactory work history to be taken into account)*

You also have an opportunity to have an interview with me *(the delegated officer or decision maker)*, accompanied by a support person of your choice (can be a legal or union representative, but not acting as an advocate) before a final decision is made.

You may also nominate a person to speak on your behalf including a union representative but that person may not act as a legal advocate.

Should you wish to have an interview the request should be made within seven (7) days of receipt of this letter. Please contact ..... who will make arrangements for this interview.

If you would like assistance at any time during this process, advice and support is available from

- Confidential counselling services are provided by the Employee Assistance Program Services. The service coordinators in your area are IPS Worldwide, Toll free: 1300 366 789 ([www.eap.com.au](http://www.eap.com.au)) and Davidson Trahaire Corpsych, Toll free: 1300 360 364 ([www.davcorp.com.au](http://www.davcorp.com.au)).
- Information about entitlements through the Staff Support Officer at the (xxxxx) Area Office;
- Welfare and other advice is also available from *(relevant union)*.

Should you have any enquiries please contact *(officer)* on *(XXXXXXXX)*

Yours sincerely

*(name) (decision maker/delegated officer)*  
*(date)*

**Note:** *The decision maker/delegated officer has discretion to extend the period for response if the officer applies for additional time and provides reasonable grounds for seeking the extension.*

**10.10 Final letter – misconduct proven final decision disciplinary action  
(Sample letter 9)**

To  
(*Officer's name and address*)

Dear

I refer to my letter of dated (XXXX) where I advised you I had formed the opinion you had engaged in misconduct and I was considering taking disciplinary action.

I have now considered the submissions and additional information provided by you and I have decided, as defined under (*choose relevant legislation*)

Section 93 B (1) of the *Teaching Service Act* 1980  
OR  
Section 22 D (1) of the *Technical and Further Education Commission Act* 1990  
OR  
Section 28 (1) of the *Education (School Administrative and Support Staff) Act* 1987

to (*take the following disciplinary action .....*) with effect  
from.....(*date*)

OR

to recommend to (*Decision Maker*) that you will be dismissed

OR

to recommend to (*Decision Maker*) that you be directed to resign within 14 days. If you fail to submit your resignation by the date designated by (*Decision Maker*) you will be taken to be dismissed.

**(NOTE: If the disciplinary action taken is NOT dismissal or direction to resign the following sentence is to be included:**  
A record of my decision will be attached to your personnel file).

If you would like assistance at any time during this process, advice and support is available from

- Confidential counselling services are provided by the Employee Assistance Program Services. The service coordinators in your area are IPS

Worldwide, Toll free: 1300 366 789 (www.eap.com.au) and Davidson Trahaire Corpsych, Toll free: 1300 360 364 (www.davcorp.com.au).

- Information about entitlements through the Staff Support Officer at the (xxxxx) Area Office;
- Welfare and other advice is also available from (*relevant union*).

Should you have any enquiries please contact (*officer*) on (XXXXXXXX)

Yours sincerely

(*name*) (*decision maker/delegated officer*)  
(*date*)

### **NOTICE OF SERVICE**

On ..... (date)

I served the decision of which the within is a duplicate upon the person to whom it is addressed by:

1. Of residence being (specify the full address)

OR

2. Sending by pre-paid post at the following place of employment / residence (specify the full address)

OR

3. Delivering to him/ her personally at the following place of employment (specify the full address)

(Signed) \_\_\_\_\_

(Date) \_\_\_\_\_



**10.11 Letter advising possible disciplinary action following unsatisfactory performance (Sample letter 10)**

To  
(Officer's name and address)

Dear

On (XXXX) your principal/TAFE manager/supervisor, (XXXXXX), advised you that he/she has identified you as experiencing difficulties in meeting the required level of performance as a (teacher/TAFE staff member/SASS staff) at (XXX XXX School/TAFE) college. Accordingly, Ms/r XXXX determined that it was appropriate to implement an improvement program in accordance with the

*Teacher Improvement Program*

OR

*Procedures for Managing School Based Non Teaching Staff Identified as Having Performance Difficulties*

OR

*Procedure for Managing Unsatisfactory Performance (TAFE Staff Members)*

The details of alleged unsatisfactory performance are that (*specify details of unsatisfactory performance*)

An improvement program was commenced on XXXXXXXXX. In his/her final report dated XXXXXXXX, M XXX identified that at the conclusion of the improvement program you did not meet the required level of performance.

As required by the procedures, M XXXX then referred the materials from the improvement program along with his/her report for Independent Review. The reviewer subsequently upheld the principal's/ TAFE manager's recommendation.

The independent reviewers report and finding was referred to me on XXXXXXXXXZ.

I am of the opinion that your work performance is still unsatisfactory and I am currently considering whether to take disciplinary action or further remedial action (if applicable).

A copy of the following documentation is enclosed:-

- The material generated during the course of the improvement program which was provided to the independent reviewers.
- The Independent Review report and finding dated (XXXXXXX).
- The relevant sections of the (choose relevant legislation)

the *Teaching Service Act 1980*

OR

the *Technical and Further Education Commission Act 1990*

OR

the *Education (School Administrative and Support Staff) Act 1987*

- *Any other relevant material (specify)*

You may also access a copy of the Guidelines from the Department's *Our Policies* website.

I will be contacting you shortly to provide you with an opportunity to make submissions to me should I be contemplating disciplinary action.

If you would like assistance at any time during this process, advice and support is available from

- Confidential counselling services are provided by the Employee Assistance Program Services. The service coordinators in your area are IPS Worldwide, Toll free: 1300 366 789 ([www.eap.com.au](http://www.eap.com.au)) and Davidson Trahaire Corpsych, Toll free: 1300 360 364 ([www.davcorp.com.au](http://www.davcorp.com.au)).
- Information about entitlements through the Staff Support Officer at the (xxxxx) Area Office;
- Welfare and other advice is also available from (*relevant union*).

Yours sincerely

(name) (*decision maker*)

(date)

## 10.12 Found performance unsatisfactory – considering disciplinary action (Sample letter 11)

To  
(Officer's name and address)

Dear

I refer to my letter dated (XXXXXXX) where I advised that I had determined that your performance was still considered unsatisfactory following a formal improvement program.

I am considering imposing disciplinary action. As previously advised on..... there are a number of possible disciplinary actions that I can take including:

- A caution or reprimand;
- The imposition of a fine;
- Reduction of your salary or demotion to a lower position;
- Directing you to resign, or to be allowed to resign within a specified period;
- Dismissal.

In relation to this matter the severest disciplinary action I would consider is:

*Need to advise severest penalty being considered for the particular matter. In particular the officer should be advised if dismissal, a direction to resign or annulment in the case of an officer on probation is being considered. If the choice is for a direction to resign, the officer should be advised of the consequences of not resigning within the time allowed – that is termination/dismissal*

Before making a final decision on the appropriate action, I will consider the following:

1. The protection of children
2. The objectives of (choose relevant legislation)

Part 4A of the *Teaching Service Act* 1980 which are as follows:

- (a) to maintain appropriate standards of conduct and work-related performance for officers in the Teaching Service,
- (b) to protect and enhance the integrity and reputation of the Teaching Service,
- (c) to ensure that the public interest is protected.

OR

Part 6A of the *Technical and Further Education Commission Act 1990* which are as follows:

- (a) to maintain appropriate standards of conduct and work-related performance for members of staff,
- (b) to protect and enhance the integrity and reputation of the TAFE Commission and staff members,
- (c) to ensure that the public interest is protected.

OR

Part 6 of the *Education (School Administrative and Support Staff) Act 1987* which are as follows:

- (a) to maintain appropriate standards of conduct and work-related performance for permanent employees,
- (b) to protect and enhance the integrity and reputation of the school administrative and support staff of the Department,
- (c) to ensure that the public interest is protected.

3. The following matters:

*(Outline the previous employment matters such as past remedial actions, warnings or discipline matters or alternatively previous satisfactory work history to be taken into account)*

You have 21 days from the receipt of this letter to make a submission and to provide any additional information which you consider should be taken into account in relation to the disciplinary action being considered before I make a final decision. I will also consider any submission made on your behalf from your union.

You also have an opportunity to have an interview with me, accompanied by a union or other representative (not in a legal advocacy role) before a final decision is made. Your representative may speak on your behalf at the interview but may not attempt to cross examine me.

Should you wish to have an interview the request should be made within seven (7) days of receipt of this letter. Please contact ..... who will make arrangements for this interview.

Any submissions and/or additional information will be taken into consideration before a decision is made to implement the disciplinary action being considered.

If you would like assistance at any time during this process, advice and support is available from

- Confidential counselling services are provided by the Employee Assistance Program Services. The service coordinators in your area are IPS Worldwide, Toll free: 1300 366 789 ([www.eap.com.au](http://www.eap.com.au)) and Davidson Trahaire Corpsych, Toll free: 1300 360 364 ([www.davcorp.com.au](http://www.davcorp.com.au)).

- Information about entitlements through the Staff Support Officer at the (xxxxx) Area Office;
- Welfare and other advice is also available from *(relevant union)*.

Should you have any enquiries please contact *(officer)* on *(XXXXXXXX)*

Yours sincerely

*(name) (decision maker)*  
*(date)*

**Note:** *The Director-General has discretion to extend the period for response if the officer applies for additional time and provides reasonable grounds for seeking the extension*

**10.13 Final decision disciplinary action to be taken re work performance  
(Sample letter 12)**

To  
(*Officer's name and address*)

Dear

I refer to my letter of ..... (*date*) where I advised you I had formed the opinion that your work performance was still unsatisfactory following completion of an improvement program and that I was considering imposing disciplinary action.

I have now considered the submissions and additional information provided by you and I have decided, as defined under (*choose relevant legislation*)

Section 93 B (1) of the *Teaching Service Act* 1980

OR

Section 22 D (1) of the *Technical and Further Education Commission Act* 1990

OR

Section 28 (1) of the *Education (School Administrative and Support Staff) Act* 1987

to (*take the following disciplinary action* ..... ) with effect from.....(*date*)

OR

to recommend to (*Decision Maker*) that you will be dismissed

OR

to recommend to (*Decision Maker*) that you be directed to resign within 14 days. If you fail to submit your resignation by the date designated by (*Decision Maker*) you will be taken to be dismissed.

**(NOTE: If the disciplinary action taken is NOT dismissal or direction to resign the following sentence is to be included:**

A record of my decision will be attached to your personnel file).

If you would like assistance at any time during this process, advice and support is available from

- Confidential counselling services are provided by the Employee Assistance Program Services. The service coordinators in your area are IPS

Worldwide, Toll free: 1300 366 789 ([www.eap.com.au](http://www.eap.com.au)) and Davidson Trahaire Corpsych, Toll free: 1300 360 364 ([www.davcorp.com.au](http://www.davcorp.com.au)).

- Information about entitlements through the Staff Support Officer at the (xxxxx) Area Office;
- Welfare and other advice is also available from (*relevant union*).

Should you have any enquiries please contact (*officer*) on (XXXXXXXX)

Yours sincerely

(*name*) (*decision maker*)  
(*date*)

## **NOTICE OF SERVICE**

On ..... (date)

I served the decision of which the within is a duplicate upon the person to whom it is addressed by:

4. Of residence being (specify the full address)

OR

5. Sending by pre-paid post at the following place of employment / residence (specify the full address)

OR

6. Delivering to him/ her personally at the following place of employment (specify the full address)

(Signed) \_\_\_\_\_

(Date) \_\_\_\_\_

## 10.14 Unsatisfactory performance resulting in remedial action (Sample letter 13)

To  
(Officer's name and address)

Dear

I refer to my letter dated (XXXXXXX) where I advised you that I had determined that your performance was unsatisfactory following a formal improvement program.

All the information obtained, *including your response (OR submission OR the report provided by you)* has been carefully considered.

I have decided to take remedial action as defined under (*choose appropriate legislation*);

Section 93B (1) of the *Teaching Service Act* 1980

OR

Section 22D (1) of the *Technical and Further Education Commission Act* 1990

OR

Section 28 (1) of the *Education (School Administration and Support Staff) Act* 1987

The remedial action I propose is (*select from the options below – may be more than one*):

- counselling
- training and development
- monitoring the officer's conduct or performance
- implementing a plan addressing unsatisfactory performance
- the issuing of a warning to the officer that certain conduct is unacceptable or that the officer's performance is not satisfactory
- transferring the officer to another position in the Teaching Service that does not involve a reduction of salary or demotion to a lower position<sup>9</sup>, and
- any other action of a similar nature (specify)<sup>10</sup>.

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<sup>9</sup> The officer must be provided with a minimum of 14 days to provide a submission if this is the chosen remedial action.



If you would like assistance at any time during this process, advice and support is available from

- Confidential counselling services are provided by the Employee Assistance Program Services. The service coordinators in your area are IPS Worldwide, Toll free: 1300 366 789 ([www.eap.com.au](http://www.eap.com.au)) and Davidson Trahaire Corpsych, Toll free: 1300 360 364 ([www.davcorp.com.au](http://www.davcorp.com.au)).
- Information about entitlements through the Staff Support Officer at the (xxxxx) Area Office;
- Welfare and other advice is also available from (*relevant union*).

Should you have any enquiries please contact (*officer*) on (XXXXXXXX)

Yours sincerely

(*name*) (*decision maker*)  
(*date*)

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<sup>10</sup> A comprehensive list is not included. Other actions **may** include, but is not limited to, mentoring, supervision or referral to appropriate policies.

**10.15 Matter finalised following conviction for a serious offence – no disciplinary action (Sample letter 14)**

To  
(*Officer's name and address*)

Dear

I refer to your finding of guilt at (*court, location*) on (*date of conviction*).

All the information obtained relating to the offence as well as *your response (OR submission OR the report provided by you)* has been carefully considered.

I have determined that no further action will be taken in relation to this matter.

(*I have requested your Principal/Supervisor to advise you of this outcome and for appropriate follow-up, which may include providing you with advice and support<sup>11</sup>*)

If you would like assistance at any time during this process, advice and support is available from

- Confidential counselling services are provided by the Employee Assistance Program Services. The service coordinators in your area are IPS Worldwide, Toll free: 1300 366 789 ([www.eap.com.au](http://www.eap.com.au)) and Davidson Trahaire Corpsych, Toll free: 1300 360 364 ([www.davcorp.com.au](http://www.davcorp.com.au)).
- Information about entitlements through the Staff Support Officer at the (xxxxx) Area Office;
- Welfare and other advice is also available from (*relevant union*).

Should you have any enquiries please contact (*officer*) on (XXXXXXXXXX).

Yours sincerely

(*name*) (*decision maker*)  
(*date*)

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<sup>11</sup> This paragraph may be required for follow up action by a principal or supervisor as required by the individual matter.

## 10.16 Remedial action following conviction (Sample letter 15)

To  
(Officer's name and address)

Dear

I refer to your finding of guilt at (*court, location*) on (*date of finding of guilt*).

All the information obtained relating to the offence as well as *your response (OR submission OR the report provided by you)* has been carefully considered.

I have decided to take remedial action as defined under (*choose appropriate legislation*);

Section 93B (1) of the *Teaching Service Act 1980*

OR

Section 22D (1) of the *Technical and Further Education Commission Act 1990*

OR

Section 28 (1) of the *Education (School Administration and Support Staff) Act 1987*.

The remedial action I propose is (*select from the options below – may be more than one*):

- counselling
- training and development
- monitoring the officer's conduct or performance
- implementing a plan addressing unsatisfactory performance
- the issuing of a warning to the officer that certain conduct is unacceptable or that the officer's performance is not satisfactory
- transferring the officer to another position in the Teaching Service that does not involve a reduction of salary or demotion to a lower position<sup>12</sup>, and
- any other action of a similar nature (*specify*)<sup>13</sup>.

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<sup>12</sup> The officer must be provided with a minimum of 14 days to provide a submission if this is the chosen remedial action.

If you would like assistance at any time during this process, advice and support is available from

- Confidential counselling services are provided by the Employee Assistance Program Services. The service coordinators in your area are IPS Worldwide, Toll free: 1300 366 789 ([www.eap.com.au](http://www.eap.com.au)) and Davidson Trahaire Corpsych, Toll free: 1300 360 364 ([www.davcorp.com.au](http://www.davcorp.com.au)).
- Information about entitlements through the Staff Support Officer at the (xxxxx) Area Office;
- Welfare and other advice is also available from (*relevant union*).

Should you have any enquiries please contact (*officer*) on (XXXXXXXX)

Yours sincerely

(*name*) (*decision maker*)  
(*date*)

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<sup>13</sup> A comprehensive list is not included. Other actions **may** include, but is not limited to, mentoring, supervision or referral to appropriate policies.

## 10.17 Disciplinary action being considered following conviction (Sample letter 16)

To  
(Officer's name and address)

Dear

I refer to a finding of guilt against you at (*court, location*) on (*date of finding of guilt*).

All the information obtained relating to the offence as well as *your response (OR submission OR the report provided by you)* has been carefully considered.

I have carefully considered all the available information and I have formed the opinion that it is appropriate to proceed to disciplinary action.

There are a number of possible disciplinary actions that I can take including:

- A caution or reprimand;
- The imposition of a fine;
- Reduction of your salary or demotion to a lower position;
- Directing you to resign, or to be allowed to resign within a specified period;
- Dismissal.

In relation to this matter the severest penalty I would conceivably impose or recommend is:

*Need to advise severest penalty being considered for the particular matter. In particular the officer should be advised if dismissal, a direction to resign or annulment in the case of an officer on probation is being considered. If the choice is for a direction to resign, the officer should be advised of the consequences of not resigning within the time allowed – that is termination/dismissal*

You have 14 days from the receipt of this letter to make a submission and to provide any additional information which you consider should be taken into account in relation to the disciplinary action being considered before I make a final decision. I would also consider any submission on your behalf from your union.

Should you require an extension of time to respond, I will consider any reasonable request.

Before making a final decision on the appropriate action, I will consider the following:

1. The details of the finding of guilt against you at (*court, location*) on (*date of finding of guilt*)
2. The protection of children.
3. Your submission if made.
4. The objectives of (*choose relevant legislation*)

Part 4A of the *Teaching Service Act* 1980 which are as follows:

- (a) to maintain appropriate standards of conduct and work-related performance for officers in the Teaching Service,
- (b) to protect and enhance the integrity and reputation of the Teaching Service,
- (c) to ensure that the public interest is protected.

OR

Part 6A of the *Technical and Further Education Commission Act* 1990 which are as follows:

- (a) to maintain appropriate standards of conduct and work-related performance for members of staff,
- (b) to protect and enhance the integrity and reputation of the TAFE Commission and staff members,
- (c) to ensure that the public interest is protected.

OR

Part 6 of the *Education (School Administrative and Support Staff) Act* 1987 which are as follows:

- (a) to maintain appropriate standards of conduct and work-related performance for permanent employees,
- (b) to protect and enhance the integrity and reputation of the school administrative and support staff of the Department,
- (c) to ensure that the public interest is protected.

5. The following matters:

*Outline the previous employment matters (such as past remedial actions, warnings or discipline matters or alternatively previous satisfactory work history) to be taken into account.*

You also have an opportunity to have an interview with me, accompanied by a union or other representative (not in a legal advocacy role) before a final decision is made. Your representative may speak on your behalf at the interview but may not attempt to cross examine me.

Should you wish to have an interview the request should be made within seven (7) days of receipt of this letter. Please contact .....who will make arrangements for this interview.

If you would like assistance at any time during this process, advice and support is available from

- Confidential counselling services are provided by the Employee Assistance Program Services. The service coordinators in your area are IPS Worldwide, Toll free: 1300 366 789 ([www.eap.com.au](http://www.eap.com.au)) and Davidson Trahaire Corpsych, Toll free: 1300 360 364 ([www.davcorp.com.au](http://www.davcorp.com.au)).
- Information about entitlements through the Staff Support Officer at the (xxxxx) Area Office;
- Welfare and other advice is also available from (*relevant union*).

Should you have any enquiries please contact (officer) on (XXXXXXX)

Yours sincerely

(*name*) (*decision maker*)  
(*date*)

**Note:** *The decision maker/delegated officer has discretion to extend the period for response if the officer applies for additional time and provides reasonable grounds for seeking the extension.*

**10.18 Timeframe letter to be sent after 18 weeks and then each 12 weeks  
(Sample letter 17)**

**PRIVATE AND CONFIDENTIAL**

To  
(Officer's name and address)

Dear

As you are aware, I have been asked by (*name*, title), to investigate and prepare an Investigation Report into (*an*) allegation(s) that you may have engaged in misconduct.

You were previously advised that this matter is being dealt with in accordance with the *Guidelines for the Management of Conduct and Performance*. I remind you that these Guidelines can be accessed at [www.det.nsw.edu.au/policies/](http://www.det.nsw.edu.au/policies/).

I wish to advise that the investigation of the allegation(s) is at the stage of....

It is anticipated that the investigation will be concluded in (number) weeks.

If appropriate:  
To date, delay has occurred due to...

The completion of the matter may be delayed due to...  
(*Examples of reasons may be complexity, exceptional circumstances (explain), external authority involvement, etc*)

If you would like assistance at any time during this process, advice and support is available from:

- Confidential counselling services are provided by the Employee Assistance Program Services. The service coordinators in your area are IPS Worldwide, Toll free: 1300 366 789 ([www.eap.com.au](http://www.eap.com.au)) and Davidson Trahaire Corpsych, Toll free: 1300 360 364 ([www.davcorp.com.au](http://www.davcorp.com.au)).
- Information about entitlements through the Staff Support Officer at the (xxxxxx) Area Office;
- Welfare and other advice is also available from (*relevant union*).

Should you have any enquiries please contact (officer) on (XXXXXXXX)

Yours sincerely

(*Investigator name,  
title*)  
(*date*)