

# Human Resources

## Guidelines for Managing Complaints, Misconduct and Unsatisfactory Performance in the VPS



# GUIDELINES FOR MANAGING COMPLAINTS, MISCONDUCT AND UNSATISFACTORY PERFORMANCE IN THE VPS

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## PART 1 GENERAL PRINCIPLES APPLICABLE TO MANAGING COMPLAINTS, MISCONDUCT AND UNSATISFACTORY PERFORMANCE FOR VPS EMPLOYEES

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### Overview

Every day, managers may deal with a range of challenges such as workplace conflict, grievances, and policy issues. These matters are dealt with in accordance with the needs and requirements of the particular workplace, taking into account Department of Education and Training (“Department”) policy and best practice. The Guidelines for Managing Complaints, Misconduct and Unsatisfactory Performance in the VPS (“the Guidelines”) are intended to assist with managing complaints against employees and unsatisfactory performance and misconduct involving employees. The Guidelines are not intended to regulate the day-to-day management of ordinary workplace issues and challenges.

The Department has a responsibility to ensure that its employees and any other persons working with the Department (including contractors and volunteers) maintain high standards of conduct and performance. The Department is committed to a high performing workforce and to providing safe and supportive work environments where excellence is pursued, underperformance is managed, diversity is valued and everyone is treated with respect, fairness and dignity. Discrimination, sexual and other forms of harassment, bullying, violence and threatening behaviour are unacceptable. It is therefore incumbent on a manager to act where a complaint, unsatisfactory performance or misconduct is brought to his or her attention, whether or not a formal complaint has been lodged.

Recognition that misconduct and unsatisfactory performance will be dealt with promptly and fairly and within the context of an improvement focussed set of procedures, is an integral component of a positive, healthy, successful and fulfilling working environment.

The Victorian Public Service Enterprise Agreement 2016 (**Agreement**) details a process for managing misconduct and unsatisfactory performance for VPS employees. The Nurses (Department of Education and Early Childhood Development) Agreement 2009 (“Nurses Agreement”) details an identical process for nurses employed by the Department. The processes in the Guidelines reflect the requirements of both Agreements.

The misconduct and unsatisfactory performance procedures in the Guidelines are consistent with the Agreement. Those procedures do not apply to casual employees and employees who are subject to a probationary period of employment.

## Definitions

In these Guidelines, a reference to:

- 'the Secretary' may include a reference to the Secretary's delegate; and
- 'a manager' may also include a reference to an investigator where one has been appointed.

## Fairness for all

In the management of complaints, misconduct and unsatisfactory performance matters, the principles of natural justice must be observed as required. The Guidelines incorporate these principles and include the following

- the right of an employee to know the allegation(s) being made against him or her;
- the right of each party to be heard in respect to the allegations;
- the right of each party to be treated fairly;
- the right of the employee to have a support person or representative present during formal interviews as part of these Guidelines (the role of the support person/representative is detailed below in the Guidelines);
- the right of each party to an investigator and a decision maker who acts fairly and in good faith; and
- the right that a decision is based on evidence.

## General principles in the Agreement

For matters involving alleged misconduct and unsatisfactory performance under the Agreement, any disciplinary action will be consistent with the principles of procedural fairness. This means:

- All parties involved in the process will commit to completing it as quickly as practicable.
- The employer must take into account any reasonable explanation of any failure by the employee to participate, before making a decision.
- Before commencing a misconduct or unsatisfactory performance process, the employer must:

- tell the employee the purpose of any meeting;
- provide the employee with a copy of the Guidelines;
- provide a reasonable opportunity for the employee to seek advice, including obtaining advice from their Union before any procedure commences
- allow the employee the opportunity to provide details of any mitigating circumstances.

Consistent with the *Fair Work Act 2009* the Guidelines have been developed to ensure that the principle of a “fair go all round” is accorded to all parties. That is, the principles of procedural and substantive fairness underpin any investigation or inquiry into an employee’s performance or conduct. Employees are responsible for participating in any of the procedures in the Guidelines in good faith.

The implementation of the Guidelines should:

- support the education and welfare of employees and where relevant, students, ensuring appropriate duty of care is maintained
- reinforce that the Department will consider all matters seriously
- ensure that all matters are dealt with in a fair and consistent manner
- highlight occurrences of unacceptable and inappropriate behaviour and the need for preventative strategies in particular areas
- meet the Department’s legal obligation to take all ‘reasonable precautions’ to prevent discrimination and sexual harassment
- reduce the risk of the Department, the school council or other parties being held vicariously liable for the actions of individuals that contravene anti-discrimination legislation
- prevent the unnecessary escalation of the situation
- occur in a timely manner
- ensure the provision of natural justice to all parties, as appropriate.

## Public sector values and employment principles

The public sector values underpin and reflect the behaviours essential to the relationship between the public sector and the Government, the public sector and the community, and between those who work in the public sector. The values apply to all employees in the Department. The employment principles provide Victorian public sector employees with a framework for ensuring all employment processes are fair and merit based.

## Public sector values

The *Public Administration Act 2004* specifies the public sector values to be observed by all Victorian public officials, including employees of the Department. The values set out in section 7 may be summarised as follows:

**a. Responsiveness**

- provide frank, impartial and timely advice to the government
- provide high quality services to the Victorian community
- identify and promote best practice

**b. Integrity**

- be honest, open and transparent in their dealings
- use powers responsibly
- report improper conduct
- avoid any real or apparent conflicts of interest
- strive to earn and sustain a high level of public trust

**c. Impartiality**

- make decisions and provide advice on merit and without bias, caprice, favouritism or self interest
- act fairly by objectively considering all relevant facts and fair criteria
- implement government policies and programs equitably

**d. Accountability**

- work towards clear objectives in a transparent manner
- accept responsibility for decisions and actions
- seek to achieve best use of resources
- submit to appropriate scrutiny

**e. Respect**

- demonstrate respect for colleagues, other public officials and members of the Victorian community by:
  - treating them fairly and objectively
  - ensuring freedom from discrimination, harassment and bullying

- using their views to improve outcomes on an ongoing basis
- f. Leadership**
- demonstrate leadership by actively implementing, promoting and supporting these values
- g. Human rights**
- respect and promote the human rights set out in the Charter of Human Rights and Responsibilities by:
    - making decisions and providing advice consistent with human rights
    - actively implementing, promoting and supporting human rights

The Public Sector Standards Commissioner has also issued binding Standards and non-binding Guidelines on:

- Equal Employment Opportunity
- Fair and Reasonable Treatment
- Merit in Employment
- Reasonable Avenues of Redress

These may be obtained from the [Victorian Public Sector Commission's](#) website.

The Public Sector Standards Commissioner has also issued a [Code of Conduct](#) which applies to the public sector. The Code is based on the values set out in the *Public Administration Act 2004*.

### Employment principles

Under section 8 of the *Public Administration Act 2004*, the Secretary must establish employment processes that ensure that:

- employment decisions are based on merit
- public sector employees are treated fairly and reasonably
- equal employment opportunity is provided
- human rights as set out in the [Charter of Human Rights and Responsibilities](#) are upheld

- public sector employees have a reasonable avenue of redress against unfair or unreasonable treatment

The Guidelines are consistent with the employment principles under the *Public Administration Act 2004*.

## Reportable conduct, sexual assault and suspected criminal offences

Some matters, such as ‘reportable conduct’ allegations, alleged sexual assault or criminal offences, must be notified to the Employee Conduct Branch **as soon as possible after a manager becomes aware of them**, regardless of whether a manager decides to respond to the matter using the complaints process, unsatisfactory performance process or misconduct process.

### What are ‘reportable conduct’ allegations?

The *Child Wellbeing and Safety Act 2005* (Vic) imposes obligations on the Secretary of the Department (or the officers she authorises to act on her behalf – in this case the Manager of the Employee Conduct Branch) to report certain conduct (known as ‘reportable conduct’) to the Commission for Children and Young People (**CCYP**).

This means, managers must notify the Employee Conduct Branch as soon as possible if there is an allegation that a person who is over the age of 18 years and who is a:

- Department employee (including a principal or teaching staff member);
- contractor;
- volunteer (including parent volunteers);
- allied health practitioner;
- school council employee;
- officer; or
- office holder,

has engaged in ‘reportable conduct’ towards a child.

‘Reportable conduct’ is conduct that leads a manager to form a ‘reasonable belief’ that there has been:

- a sexual offence, sexual misconduct or physical violence committed against, with or in the presence of a child;
- behaviour causing significant emotional or psychological harm to a child; or
- significant neglect of a child, or

misconduct involving any of the above.

‘Reportable conduct’ is broad, and includes conduct alleged to have occurred *outside* the course of a person’s employment or engagement with the Department.

If you are unsure as to whether or not a matter involves reportable conduct, you should contact the Employee Conduct Branch for further advice.

When a manager notifies the Employee Conduct Branch of a ‘reportable conduct’ allegation, the Employee Conduct Branch will then report the allegation to the



Commission for Children and Young People (**CCYP**), on behalf of the Department. The CCYP is an independent body charged with monitoring the way Victorian organisations respond to child abuse allegations.

Managers do not need to report matters to the CCYP directly. However, managers must:

- still comply with mandatory reporting and other reporting obligations (as applicable), including contacting Victoria Police if they suspect a criminal offence has occurred; and
- continue to manage a matter in accordance with these Guidelines, when notifying a ‘reportable conduct’ allegation to the Employee Conduct Branch.

For further guidance on what is ‘reportable conduct’, please refer to the [Reportable Conduct Intranet page](#). For further information on forming a ‘reasonable belief’ in this context, please refer to the [PROTECT Resource](#).

### **Sexual assault and suspected criminal offences**

Managers must report suspected criminal conduct, including:

- allegations of sexual assault; and / or
- any other criminal offences,

to the Victoria Police, and immediately advise the Employee Conduct Branch of the allegations. Further information about responding to allegations of sexual assault or criminal offences is set out at page 33 below.

### **Right of an employee to a support person or representative**

Employees are entitled to involve a support person/representative in relation to matters arising under the Guidelines. In particular, the Agreement provides that employees are entitled to be represented by a person of their choice which may be a Union representative at any stage of the formal review meetings of the unsatisfactory work performance management process, or at any stage of the misconduct process.

It is the employer’s role to advise the employee of the right to a support person or representative.

A support person may be another employee, a friend, family member or a representative of their union. It is up to the employee and the person whom they nominate as their support person or representative to decide how the role will be performed. The main purpose of the role is to provide moral and practical support, guidance and advocacy to the employee.

The support person/representative is expected to treat all matters in a sensitive, respectful and confidential way.

It is acknowledged that the support person/representative may have a valuable role in clarifying matters between the manager and the employee and the support person/representative may speak to the manager on behalf of the employee.

The employee must provide reasonable notice of a representative/support person's attendance at a formal meeting in respect to these processes.

If the employee chooses not to have a support person/representative the process should still continue. It should be recorded that the employee declined to have a support person/representative present.

It is not appropriate for meetings to be unreasonably delayed due to the unavailability of an employee's support person/representative. If this occurs, the employee should be advised to nominate another support person/representative. However, reasonable attempts should be made to achieve agreed meeting times.

The local complaints resolution process and the misconduct and unsatisfactory performance procedures are designed to ensure there is fair treatment all round and that the matters in question are dealt with appropriately and reasonably. In many instances the involvement of a support person/representative will make a valuable contribution to this process by assisting in clarifying matters between the manager and the employee. This could include the support person/representative speaking to the manager on behalf of the employee. It is important that the support person/representative and manager do not conduct themselves in a way that hinders resolution or determination of the facts or issues and thereby disrupting the process. If a support person/representative does conduct themselves in a way that is disrupting the process, they may be asked to leave the meeting or the meeting may be terminated or rescheduled.

The manager or decision-maker is expected to have a note taker present at all meetings. The employee should be provided with a record of discussions and outcomes if requested.

### **Support and referral assistance for complainants**

An employee who has a concern about discrimination, harassment or bullying may seek assistance from a Workplace Contact Officer in their region or at head office. Workplace Contact Officers draw on existing Department guidelines, policies and procedures to confidentially and impartially discuss concerns with employees, provide information on supports available and highlight options, informal and formal, that employees may choose from to pursue a resolution.

The Department's [Employee Assistance Program](#) (EAP) may also assist employees with concerns. It offers confidential counselling to complainants and any other employee

involved in a complaint or disciplinary proceeding. For example, employees called to give evidence before a court or a [Merit Protection Board](#) may access specialised support from 'court' experienced counsellors.

## Confidentiality

All persons involved in a complaint, unsatisfactory performance or misconduct process must observe confidentiality, unless otherwise authorised or required to disclose information. Employees are entitled to seek personal and professional support and advice from a union or other professional body or person.

Confidentiality is an important issue in any investigation concerning employees, students or members of the wider school community. Confidentiality assists the investigative process by encouraging witnesses to be forthcoming in their evidence. It reduces the likelihood or opportunity for evidence to become compromised and also reduces the risk of untested or unsubstantiated allegations being circulated outside of the complaint process. Confidentiality also helps develop and maintain employee confidence in the process. Should details of a complaint become widely known, it may be less likely that the complaint will be successfully resolved to the satisfaction of all parties.

However, confidentiality does not preclude the details of a person's evidence being provided to the respondent or a witness for a proper purpose in connection with an investigation. The considered disclosure of critical evidence by the investigator to persons who have a role or contribution to make in the investigation can be an important part of an investigation. Where this occurs, it should be done as discreetly as possible.

The requirement for confidentiality should not impede an employee's ability to prepare a response to an allegation. As mentioned above, employees are entitled to seek personal and professional support and advice from individuals who have knowledge of the complaint, and the seeking of such support is not considered to be a breach of confidentiality. It is not appropriate for employees to initiate a discussion of the complaint with fellow employees, and/or the wider community but an employee is entitled to explain to colleagues in response to questions that he or she is entitled to the presumption of innocence.

The manager must ensure that they observe appropriate confidentiality in relation to the management of any complaint, unsatisfactory performance or misconduct procedure. The manager must advise all witnesses of their obligation to keep details of the investigation confidential and respect the confidentiality rights of the employee or complainant involved. However, in order to conduct a thorough investigation, it

may be necessary for the manager to disclose certain information to other persons involved in the investigation or management of the matter.

Proper steps should be taken at every stage of the process to secure documentation. The use of e-mail or facsimiles as part of the process may require particular arrangements to be put in place to ensure confidentiality is not breached.

At the end of an investigation, a complainant and/or witness/s may want to know the outcome of the investigation. In such cases, the interests and rights of the complainant and witness/s to know that the complaint has been dealt with appropriately should be balanced with the interests and rights of the respondent (to have the investigation kept confidential). In this case, the employer should inform the complainant and witness/s that an investigation has taken place and been completed and it resulted in an appropriate outcome. To provide the complainant and witness/s with details of the exact outcome may be a breach of privacy. Providing some comment about the outcome of an investigation is important to avoid a potential complaint that nothing has been done about an allegation and also to send the message that the employer is committed to eliminating inappropriate behaviour.

Information regarding the Department's privacy policies can be found at: [Information Privacy Policy](#).

## Witnesses

The employee must not approach witnesses to discuss the details of the complaint or investigation. In no circumstances is the employee to question or interrogate complainants or students in relation to an investigation. However, they may inform an employee that they have provided their name to the manager for the purposes of being interviewed in relation to the information that the employee may have that is relevant to the investigation. The reason for this protocol is to protect the integrity of the investigation, to ensure that there can be no suggestion of intimidation of any witness and to preserve the welfare of students. A breach of this protocol will be regarded as a serious breach and may lead to action in respect to misconduct.

An employee may nominate to the manager the names of witnesses, who in the employee's opinion have relevant evidence to give and should be interviewed as part of any investigation. On receipt of these names, the manager will determine which, if any, of these people will be interviewed and will contact them directly. The employee has no right to be present during the interviews with witnesses.

Witnesses who are employees of the Department should be offered the opportunity for support and assistance as set out above under 'Support and referral assistance'.

## Defamation

Defamation is a specific area of law that deals with the loss of reputation or public standing.

It is generally not defamatory for an individual to make a complaint or raise a concern in good faith through the proper procedures. However, the matter should only be discussed with those who have responsibility for dealing with it. A claim that defamation has occurred may be defended on the basis that the alleged defamatory statement was made without malice and only to a person with a proper duty to receive such a statement.

Allegations may carry the risk of a claim of defamation especially if confidentiality has not been maintained properly.

## Protection from Victimisation

The Department will not tolerate victimisation. Victimisation occurs when a person is subjected to or threatened with any detriment for his or her involvement, whatever that may be, in the matter at issue.

Managers need to be aware that victimisation of one or more of the parties involved in a particular matter may occur. Reasonable precautions need to be taken to prevent this from happening. In implementing these processes, the manager should make it clear to the persons involved that victimisation is not tolerated and may be dealt with in accordance with the misconduct procedures.

Victimisation for making a complaint of discrimination, racial or religious vilification or sexual harassment is also unlawful under relevant legislation.

Victimisation should not be confused with the natural consequences of a properly applied process. A person who claims the application of these procedures to be victimisation should be counselled about due process.

If an employee believes that, as a result of making a complaint about another employee, they have been victimised, they should raise those concerns with their manager who will ensure that appropriate protections are afforded to the employee.

The manager must ensure that persons affected by the alleged misconduct are provided with appropriate support, such as referring them to the Department's Employee Assistance Program for counselling.

## Whistleblowers Protection

Where a complainant has real and substantial concerns that, as a result of raising a complaint, they may suffer a detriment, they may have access to protection under the provisions of the *Protected Disclosure Act 2012*. The *Protected Disclosure Act 2012* defines the types of complaints that may be accepted as complaints under the Act.

Further information regarding the [Protected Disclosure Act](#) is available on the Department's website.

## Vexatious Complaints

Grievances lodged by employees must be genuine. However, there may be some instances where complaints may be determined to be vexatious or frivolous in nature. Where the manager considers that this may be the case, the manager must inform the person that they intend to dismiss their complaint, unless the person can show good cause as to why their complaint shouldn't be considered vexatious or frivolous.

If the person cannot show good cause, the complaint should be dismissed and the complainant counselled about his or her action in lodging a vexatious complaint. Making a vexatious complaint may be considered an act of misconduct.

## Documentation

Documents relating to a complaint, unsatisfactory performance or misconduct procedure should be placed by the manager in a sealed envelope marked 'Confidential – access limited to manager only' and filed on the employee's personnel file. There should not be anything in the envelope or personnel file that would be unknown or of surprise to the employee.

In particular, the Agreement requires the following documents to be placed on the employee's personnel file:

- A record of the formal counselling session under the unsatisfactory performance procedures
- Notification that the employee has met the required standard of performance
- The first written warning under the unsatisfactory performance procedures
- The final written warning under the unsatisfactory performance procedure
- The outcome of the unsatisfactory performance procedure

- A copy of the employer's advice to the employee of the discipline outcome in a misconduct procedure.

All documents created as part of the processes in the Guidelines should be clearly legible, dated and signed with the author clearly identified.

Generally, only the manager or other authorised persons would access these documents as they may contain information that could be considered to be about the personal affairs of people involved and are subject to strict privacy provisions. Managers are responsible for ensuring that all documents are handled with absolute confidentiality. Where possible, faxes should be sent to a machine that cannot be accessed by other staff members. Managers may also need to ensure the confidentiality of any emails sent or received in relation to a particular matter.

Application may be made under the *Freedom of Information Act 1982* or *Information Privacy Act 2000* for copies of the documents relating to any of the processes outlined in the Guidelines. If this occurs, the Department's Freedom of Information Unit will make a determination as to what documents may be released. Employees are entitled to inspect their personnel file at any time. Inspection should occur in the presence of a suitable witness.

## Removal from duty

In some circumstances, it is not appropriate for an employee to continue working in their normal workplace during an investigation. It may be appropriate for an employee to be removed from duty where:

- there is a potential risk to the health and safety of other employees or students
- there is a potential for the employee to interfere with the investigation
- there is a risk that the alleged conduct may continue or be repeated, or
- the conduct alleged is a severe act of misconduct and the continuing presence of the employee in the workplace is not consistent with the ongoing employment relationship.

An employee may be reassigned duties or suspended from duty with pay.

Generally, an employee should be given the opportunity to respond before a decision to suspend is made. However, in circumstances where the allegations are extremely serious, it may be appropriate to reassign duties immediately, without first obtaining the employee's response pending a decision on suspension. This may include situations where there is the risk of an imminent threat to the safety of others, or of the employee destroying or tampering with evidence.

An employee who is removed immediately without being given the opportunity to respond must be invited to submit reasons why the removal should not continue.

The continuation of an employee's suspension should be reviewed at reasonable intervals.

A reassignment of an employee's duties still enables the employee to work but may remove the employee from working with a complainant or being in a position to tamper with the evidence.

Reassignment of duties and suspension from duty are neither sanctions nor penalties and should be undertaken without prejudice to the final decision.

Where Employee misconduct is alleged, the Employer may do any of the following:

- direct the Employee to proceed immediately to perform alternative duties or work at an alternative place of work
- direct the Employee not to speak to other employees of the employer about the matter or not to visit certain places of work
- suspend the Employee with pay.

A person taking the action of reassigning duties or suspending an employee must ensure they have the authority to do so. A reassignment of duties or a suspension taken in connection with a process in the Guidelines should not occur without consultation with the Department's Employee Conduct Branch. The Branch will advise on the correct process to be followed.

## **Conflict of Interest**

The principles of natural justice require that a complaint, misconduct or unsatisfactory procedure be conducted in good faith and without bias.

It is expected that a manager will play the primary role in investigating a complaint and managing an employee's unsatisfactory performance.

In some instances it may not be appropriate for the person's immediate manager to conduct an investigation due to a conflict of interest.

A perceived conflict of interest exists where a reasonable person with knowledge of the relevant facts could form the view that a person's bias could improperly influence the performance of their duties or functions.

If a person is unsure about a possible conflict of interest or how to handle a possible conflict of interest, they should seek advice from the Employee Conduct Branch.

For further information, see the [Conflict of Interest](#) Web Page on HRWeb.



## External advice and options

Employees may wish to seek external advice and assistance from their union:

- Community and Public Sector Union (CPSU). Contact details: Telephone 1300 137 636, Website [www.cpsu.org.au](http://www.cpsu.org.au).

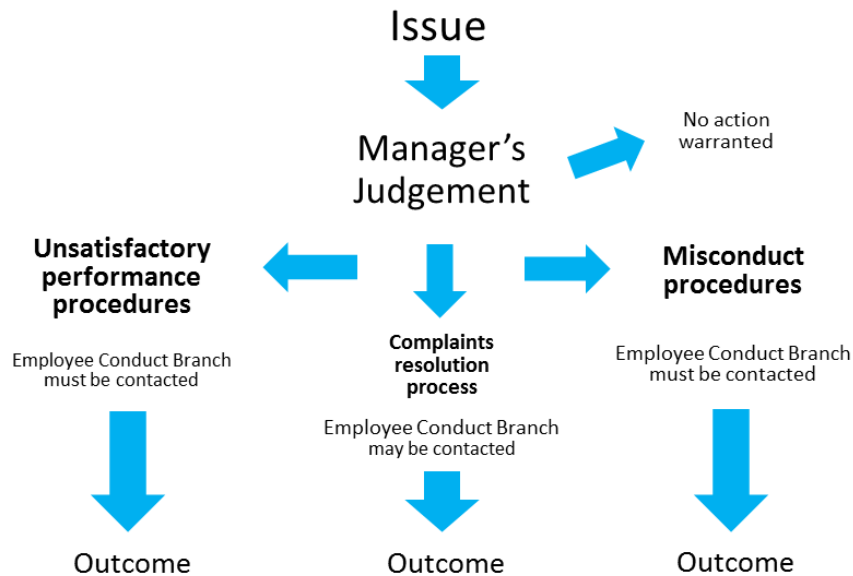
Employees may wish to contact Fair Work Australia:

- Fair Work Commission. Contact details: Telephone 1300 799 675, Website: [www.fwc.gov.au](http://www.fwc.gov.au).

## PART 2 SELECTING THE RIGHT PROCESS

### Introduction

In relation to a particular issue or incident, the manager will need to make an assessment as to the appropriate course of action to take as illustrated below:



#### ALLEGATIONS OF REPORTABLE CONDUCT

Irrespective of whether the above process are used, where a matter may involve an allegation of reportable conduct, principals/managers must contact the Employee Conduct Branch as soon as possible.

For more information, see the 'Reportable conduct, sexual assault and Criminal Offences' section below.

Alleged criminal offences should also be reported to Victoria Police. Managers should also consider whether a report to DHHS, the Security Services Unit, or the Student Critical Incident and Advisory Unit is required.

In determining the appropriate action, the manager, subject to satisfying any legal or policy requirements, should use his or her professional judgement to decide whether the matter should be dealt with under the Guidelines and if so, whether it should proceed under the complaints resolution process, unsatisfactory performance or misconduct procedures. The complaints resolution process should be used for dealing with incidents such as those described in the complaints resolution section (below) of the Guidelines and which lend themselves to local resolution between the parties. The absence of a written complaint does not prevent the complaints resolution process being implemented.

The unsatisfactory performance procedures should be used in relation to unsatisfactory performance which is defined in part 5 of the Guidelines. Unsatisfactory performance may ultimately lead to the implementation of the procedures in the Agreement and action by the Secretary under the *Public Administration Act 2004*.

The misconduct procedures are to be applied to an employee who is alleged to have engaged in conduct of a serious nature and/or repeated behaviour warranting implementation of the misconduct procedures in the Agreement and action by the Secretary under the *Public Administration Act 2004*.

The processes for managing matters under the complaints, misconduct or unsatisfactory performance procedures are set out in Parts 3, 4 and 5 of the Guidelines respectively.

## Guiding principles

There are a number of guiding principles that may assist a manager in determining the appropriate procedures to follow. These are:

- a) Is the behaviour sufficiently serious to justify a formal warning or formal counselling under the Agreement, if the suspected conduct was proven?
- b) Has the matter been the subject of a local complaints resolution process previously?
- c) Does the behaviour (if proven) appear to justify the dismissal of the employee?

If the answer to any of these questions is 'yes', it is most likely that the complaint should be dealt with under the misconduct or unsatisfactory performance procedures in the Agreement and outlined in Parts 4 and 5 of the Guidelines. If the answer is 'no', in most cases the matter will be dealt with under the local complaints resolution process.

## **Moving from complaints resolution process to misconduct or unsatisfactory performance procedures**

If it becomes evident to the manager after receiving all the evidence from the parties, that the substance of a complaint is more serious than first anticipated, or new evidence or allegations arise, the manager may refer the matter to the misconduct (Part 4) or formal unsatisfactory performance procedures (Part 5) under the Guidelines. In this situation, the manager must inform the employee that the matter has been concluded under the complaints resolution process and is now being dealt with under the misconduct or formal unsatisfactory performance procedures. The Employee Conduct Branch must be contacted prior to the manager moving from the complaints resolution process into the misconduct or formal unsatisfactory performance procedures.

### **Role of the Department's Employee Conduct Branch**

The Department's Employee Conduct Branch (formerly Conduct & Ethics) will provide advice and assistance to managers on the appropriate course of action to take. The Branch can be contacted on 9637 2595 or by email at [employee.conduct@edumail.vic.gov.au](mailto:employee.conduct@edumail.vic.gov.au).

An employee who wants to make a complaint, or who is the subject of a complaint, unsatisfactory performance or misconduct procedure, may contact the Employee Conduct Branch for information about the particular process or processes. However, it is not the role of the Branch to receive complaints or to provide support and assistance to those employees.

### **Where the matter involves the unsatisfactory performance process, or allegations of misconduct, including sexual harassment, the Employee Conduct Branch must be contacted for advice regarding the appropriate course of action. Employee Assistance Program**

The Department's Employee Assistance Program (EAP) may also assist employees resolve complaints. The EAP comprises two elements:

- A short-term solution-focused confidential counselling service consisting of up to four sessions for any work related or personal issue for individuals;
- A dedicated Manager Assist telephone advisory service to provide management advice and support to managers.

It is intended that the EAP will provide early and effective support to employees requiring assistance as well as supplement the other important support services

provided by the Employee Health Unit. EAP is available for complainants, employees subject to a complaints, misconduct or unsatisfactory work performance procedure and other employees involved in any of these procedures.

The telephone contact number for employees and managers wishing to access the EAP is 1300 361 008.

### **Conflict Resolution Support Service**

The **Conflict Resolution Support Service** is available to assist all Department employees to address workplace conflict. This includes disputes and miscommunications that impact on wellbeing and work performance. This service can provide the following:

- Mediation
- Case conferencing and facilitated meetings
- Conflict Coaching
- Team conflict intervention

To request the assistance of a trained facilitator and/or mediator Managers should call the service provider, Converge International incorporating resolutions RTK, on **1300 687 633** or e-mail: [mediation@convergeintl.com.au](mailto:mediation@convergeintl.com.au).

## PART 3 COMPLAINTS RESOLUTION PROCESSES

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### Introduction

A positive working environment is an integral component of a healthy, successful and fulfilling working environment.

Every day, managers may deal with a range of challenges including workplace conflict, grievances, and policy issues. These matters should be handled in accordance with the needs and requirements of the particular school community and workplace, taking into account Department policy and best practice. The complaints resolution processes are not intended to regulate the day-to-day management of ordinary workplace issues and challenges. Rather, they are to be used for dealing with complaints against employees or conduct which has been observed by the manager or come to their attention and which are appropriate for local resolution.

Under the local complaints resolution process, it is preferred that a complaint be made in writing and include the following information:

- the name of the complainant
- the date and time of the alleged conduct
- the location where the alleged conduct occurred
- any witnesses to the alleged conduct or other parties involved - what has been experienced or observed
- any other relevant details.

The complaint should initially be raised with an employee's immediate manager, however, in some circumstances it may not be appropriate to do so (e.g. if the complaint is against the manager). In these circumstances, the employee should contact the Employee Conduct Branch for advice.

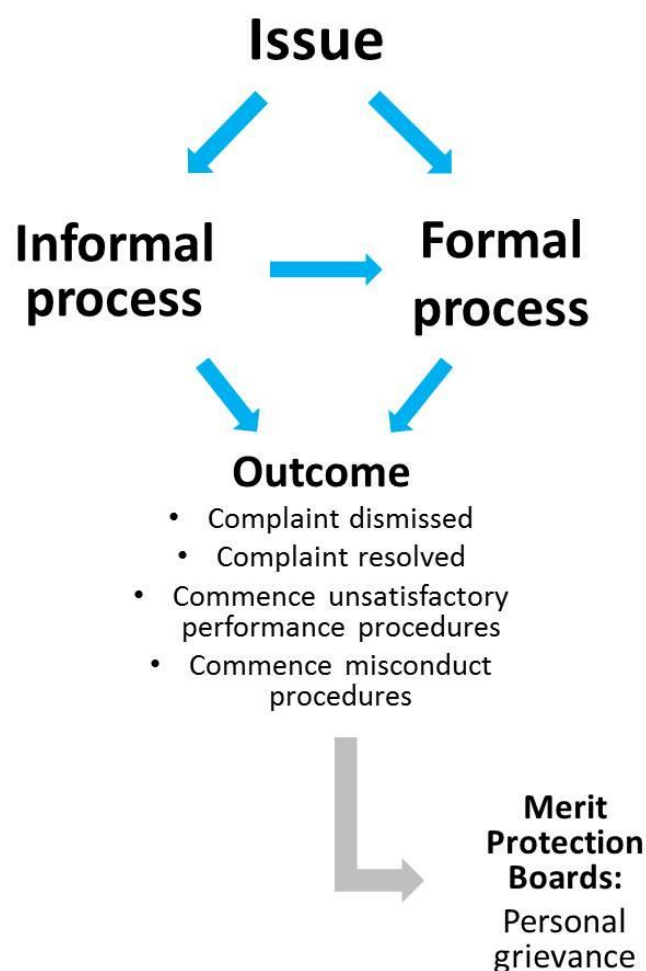
Where the complainant advises the manager they wish to remain anonymous, the manager needs to establish why the complainant does not want their identity disclosed. In this respect, the manager will need to manage the concerns of the complainant while ensuring there is an appropriate balance in fairness to all parties concerned. In most cases, it is not possible for the complainant to remain anonymous due to the right of the respondent to natural justice and to know the allegation(s) being made against him or her. Whilst the complainant's wishes should be taken into account, they do not determine whether or how the complaint should be investigated. That is the responsibility of the manager.

The manager must ensure that a complaint is dealt with in a way that is both procedurally and substantively fair. All parties involved in the process must commit to completing it as quickly as possible.

The manager can provide advice regarding the process for making a complaint.

### Complaints resolution processes

The complaints resolution processes provide a framework for the resolution of complaints against employees at a local level. Complaints against employees should be dealt with promptly using the complaints resolution procedures as outlined:



**\*Misconduct and/or unsatisfactory performance procedures under Parts 4 & 5 of the Guidelines may be implemented during the complaints resolution process if it becomes evident during the complaints resolution process that the matters is of a more serious nature than first anticipated**

The complaints resolution processes encompass both informal and formal action.

Upon receiving a complaint, the manager will assess the nature of the complaint and form a view regarding the appropriate course of action. In exceptional circumstances, it is open to a manager to decline to accept a complaint where he or she is satisfied the complaint is frivolous, vexatious or without substance (refer to 'Vexatious Complaints' in Part 1 of the Guidelines above for more information on frivolous or vexatious complaints).

The manager will need to make an assessment in each case about whether the concern or complaint requires the use of a formal process or whether informal resolution is appropriate. **If the matter involves allegations of misconduct or sexual harassment the manager must contact the Employee Conduct Branch for advice.**

Many concerns expressed to the manager are most appropriately dealt with at an informal level. Managers are encouraged to resolve complaints at an informal level where appropriate. The parties to a complaint are equally encouraged to attempt to resolve complaints informally. There are many situations, however, where it may not be appropriate to resolve complaints at an informal level.

### Informal process

The manager may decide to respond to a complaint through an informal process where the complaint lends itself to local resolution and:

- the complaint is of a minor nature or if it is of a more serious nature, the manager considers that it is appropriate to do so and the complainant agrees;
- the complainant wishes the matter dealt with informally and the manager considers this appropriate in the circumstances; or
- a complaint has arisen from lack of, or unclear, communication.

Informal resolution of a complaint may involve talking to one or more of the parties. The complainant may wish to deal with the situation himself or herself but may seek advice as to possible strategies to resolve the matter. The complainant may ask the manager, or another person, to speak to the employee on his or her behalf. The manager, or other person, may then privately convey the complainant's concerns, listen to the response of the employee and respond accordingly. Informal procedures emphasise resolution rather than determining the substance of a complaint and may include conciliation or mediation.

The steps taken to resolve the complaint should be documented by the manager. Documentation associated with an informal process could be a diary entry and/or retention of a copy of any response provided to the complainant. However, documentation should be sufficiently detailed to provide a record of the steps taken in the management of the complaint. Providing a written response to the complainant



outlining the action taken is advisable. An informal process may be formalised at any point where the manager considers it appropriate, particularly where an informal process has been unsuccessful or new information is received.

## Mediation

Prior to determining the course of action, and where the parties agree to participate, the manager may choose to use a mediation process where the nature of the complaint lends itself to being resolved by mediation. In some matters mediation may assist the parties to resolve the complaint. However, mediation is not always appropriate, particularly in complaints involving alleged inappropriate conduct or sexual harassment.

It is important not to expose the complainant to a repeat of the behaviour already complained about. The manager must ensure that the conduct of the participants in mediation is appropriate and professional at all times. Particularly in relation to complaints of sexual harassment or bullying, it is important that the complainant understands that mediation is not mandatory and the complainant is entitled to refuse to participate without any adverse consequence.

The object of mediation is to assist the parties to achieve resolution of the complaint. Whilst mediation is not mandatory, complaints may be settled where the parties are brought together to discuss the problem and seek solutions.

Any party involved in the mediation process may include another person for support and assistance. No party to the mediation process may be represented by another person acting as an advocate or legal adviser. Where any of those involved may be disadvantaged, for example due to disability or impairment or non-English speaking background, reasonable steps should be taken to mitigate the disadvantage including reasonable accommodation and access to interpreters.

The following principles will be applied in any mediation process:

- encourage willingness in parties to acknowledge circumstances and develop solutions
- identify and working from areas of common understanding
- identify scenarios and alternative responses and behaviours
- offer counselling or other forms of welfare support
- ensure an effective mechanism for communication where there is difficulty with interpersonal relationships.

Through mediation a resolution may be achieved which is mutually acceptable to the parties, for example:

- acknowledging each other's perspective and developing agreed strategies for managing differences
- offering an apology
- giving an undertaking that inappropriate behaviour will be changed
- clarifying expectations of appropriate conduct
- counselling.

The Department's Employee Assistance Program (EAP) may also assist with a mediation process.

### **Informal complaints procedures involving allegations of sexual harassment**

Allegations of sexual harassment must be treated seriously and in most cases should be handled in accordance with the formal complaints resolution process or misconduct procedures depending on the severity of the allegations.

In certain **limited** circumstances, allegations of sexual harassment may be handled informally, for example:

- Where the complainant asks the manager, or other person to speak to the respondent on their behalf. This person should privately convey the complainant's concerns and reiterate the objectives of the Department's Sexual Harassment Policy to the respondent without assessing the merits of the case (and without establishing if the complaint has substance).
- Where the complainant wants to deal with the matter him or herself but seek advice on possible strategies to resolve the matter (i.e. from the manager, sexual harassment contact or other person). In this situation, the complainant should be advised that the employer has an obligation to the whole workplace and may be required to take action regardless of the complainant's wishes.

Where a complainant wishes to handle the matter him or herself, and the manager considers this appropriate, this does not absolve the employer of its obligation to act. This obligation exists regardless of whether the procedure implemented is formal or informal.

It is imperative that managers act as soon as they are alerted to the possibility that sexual harassment may be occurring in the workplace.

Sexual harassment can have serious ramifications for the whole of the workplace, not just for the harassed person. The employer has a duty of care to provide a safe workplace and must take responsibility for the work environment and culture.

### Supportive actions of manager in dealing with sexual harassment

With regard to complaints of sexual harassment, whether or not the complainant wishes to deal with the matter himself or herself, and the manager considers this appropriate, the obligation on the employer to act in these circumstances may require the manager to:

- reiterate to the whole workplace that sexual harassment is unacceptable and will not be tolerated
- promote the Department's [Sexual Harassment Policy](#) and the avenues for seeking advice and making complaints
- monitor the whole workplace to ensure that acceptable standards of conduct are maintained in the workplace
- ensure compliance as far as practicable with the items listed in the "Responsibilities" Sexual Harassment policy
- ensure that the alleged harasser is aware of and understands the Sexual Harassment policy (this may involve speaking directly to the respondent about the allegations)
- take any other appropriate action.

It is advisable to provide to the complainant a written response outlining the action taken and the outcome. Documentation regarding the sexual harassment complaints should be sufficiently detailed to provide a record of the steps taken in the management of the complaint. Where an informal procedure is inappropriate, unsuccessful, or the complainant wishes to pursue the matter further, the manager will implement the formal procedure.

### Formal process

Matters raised directly with the manager, arising out of their own observations or otherwise brought to the manager's attention may also warrant the use of a formal process. The Employee Conduct Branch may be contacted for advice and support in the implementation of the formal process.

The formal complaints resolution process comprises the following steps:

- |        |  |
|--------|--|
| Step 1 | Establish details of complaint and seek response |
|--------|--|

Step 2            Assess evidence

Step 3            Determine appropriate action to resolve complaint

### **Step 1            Establish details of complaint and seek response**

The commencement of a formal complaints resolution process requires the manager to establish the precise details of the complaint and seek a response in order to determine the appropriate outcome. This involves:

- Establishing the precise nature of the complaint. This may involve making a written record of the verbal complaint, interviewing the complainant and requesting that the complaint be put in writing (where this has not already occurred). The failure of a complainant to put the complaint in writing does not mean the complaint should not be addressed.
- If, following a closer examination of a complaint, it appears the substance of the complaint is more serious than first anticipated, or new evidence or allegations arise, the manager may refer the matter to the misconduct (Part 4) or unsatisfactory performance procedures (Part 5) under the Guidelines and cease the local complaints resolution procedures.
- The manager should acknowledge receipt of the complaint in writing.
- Providing to the employee the details of the complaint in writing and providing the employee with an opportunity to provide a response in writing. The employee will normally be given a minimum of three (3) days and a maximum of fourteen (14) days to respond to allegations, depending on the nature, seriousness and complexity of the allegations. It is preferable that the written details of the complaint be provided to the employee in person. The letter of complaint should include information regarding who made the complaint and when it was received, the specific allegations (including such details as the date, time and location of the action) and advice to the employee regarding confidentiality.
- Providing an indicative timeline for the process and how the examination of the issues will proceed. Where the timeline needs to be varied, the manager must advise the parties and the reasons for the variation. Managers should always consider the impact of any delay on the fairness of the process, especially if the employee has been removed from duties, as well as the welfare of the other parties to the complaint. Considering other relevant matters to assist in clarifying the complaint. This may involve examining personnel records and other documentation, requesting a written statement from any witnesses or other persons and where necessary, interviewing those people.
- Keeping written accounts of all interviews.

- Providing the opportunity for the respondent to have a support person/representative present during all meetings as part of this process.
- If the manager considers it necessary or appropriate in the circumstances, providing the opportunity for the employee to meet with the manager in person to clarify matters in the response and to provide them an opportunity to comment on any further relevant evidence including contradictory information. In exploring the complaint, the manager will need to have regard to the considerations and criteria to be applied in Step 2 (below).

*Note: Where an employee is invited to provide a written statement but does not do so, or chooses not to meet with the manager, this does not prevent the investigation of the complaint proceeding. Employees should be informed of the implications of not providing a response, for example, that the matter will progress without their version of events, as set out in a written response, being considered.*

## **Step 2            Assess the evidence**

Following completion of Step 1, the manager should assess the evidence in order to decide whether the complaint has substance and determine the appropriate action to resolve the complaint.

In addition to the information listed in Step 1, this assessment should take into consideration:

- Whether the weight and reliability of the evidence demonstrates that there is substance to the complaint.
- The circumstances and context of the complaint.
- Whether evidence was presented by the parties and witnesses in a credible and consistent manner.
- The absence of evidence where it should logically exist.

If, following the assessment of the evidence, it appears the substance of the complaint is more serious than first anticipated, or new evidence or allegations arise, the manager may refer the matter to the misconduct (Part 4) or unsatisfactory performance procedures (Part 5) under the Guidelines. The Employee Conduct Branch should be contacted for advice at this stage.

## **Step 3            Determining appropriate outcome to resolve complaint**

Following Step 2, the manager will determine the appropriate action to resolve the complaint.

### ***Where a complaint lacks substance***

If a manager has determined that a complaint lacks substance the manager should clarify any misunderstandings and deal with the issues. This may involve:

- Acknowledging different perspectives.
- Reminding those involved of expected standards of conduct.
- Monitoring the situation.

### ***Where a complaint is substantiated***

Where the manager determines that a complaint does have substance the manager may consider one or more of the following:

- the recommendation of suitable counselling, whether personal or performance based counselling
- undertakings that inappropriate behaviour will cease
- clarification of expectations of appropriate conduct
- setting up a support group
- issuing a caution in relation to the consequences of continued behaviour, and placing a copy on the employee's personnel file, along with the other documentation
- implementing a period of monitoring
- provision of a mentor
- referral to professional development
- completing the Department's Online Workplace Discrimination or Workplace Bullying Course and Sexual Harassment Training Course, if this has not already occurred (or re-doing the course if appropriate)
- referring the employee to the Department's Employee Assistance Program
- other appropriate action.

The manager will be responsible for ensuring that the course of action is implemented.

A written response outlining the resolution outcome and the reasons for it should be provided to the employee. This should include:

- whether the complaint has substance
- the reasons for the decision

- the source of information relevant to the decision
- any action to be taken as a result of the decision.

A written response should also be provided to the complainant informing them of the conclusion of the process. Where appropriate, and taking into account privacy considerations, the response should broadly outline the key findings. In some situations, it may not be appropriate to inform the complainant about the details of the action taken against the employee as that information is personal information between the employer and the employee. For more information please refer to “Confidentiality” in Part 1 of the Guidelines.

## PART 4 GUIDELINES FOR MANAGING MISCONDUCT

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### Introduction

The misconduct procedure is to be used for allegations of misconduct. It is not intended that the misconduct procedure under the Agreement be used for complaints of a minor nature (refer to Part 2 of the Guidelines for guidance as to when it may be appropriate to implement the misconduct procedures).

### Meaning of Misconduct

For the purposes of the Guidelines, the term misconduct is taken to include serious misconduct as defined by the *Fair Work Regulations 2009* (Cth), made under the *Fair Work Act 2009* (Cth).

In addition, under the Agreement, misconduct includes (but is not limited to):

- a contravention of a provision of the *Public Administration Act 2004*, the regulations to that Act, a binding code of conduct or a provision of any statute or regulation that applies to the employee in the employee's employment;
- improper conduct in an official capacity;
- a contravention, without reasonable excuse, of a lawful direction given to the employee by a person authorised to give the direction;
- an employee making improper use of his or her position for personal gain; and
- an employee making improper use of information acquired by him or her by virtue of his or her position to gain personally or for anyone else financial or other benefits or to cause detriment to the public service or the public sector.

### Examples of Misconduct

Misconduct generally involves wrongful, improper, or unlawful conduct, motivated by a premeditated or intentional purpose or by a blatant disregard to the consequences of one's acts. Misconduct may involve either gross negligence or a deliberate departure from accepted standards. Misconduct can include a single act or repeated acts.



Examples of misconduct include:

- harassment, including sexual harassment, bullying or victimisation of other staff members, students or the public
- ‘reportable conduct’ allegations, which are allegations of inappropriate conduct towards a child, including a sexual offence, sexual misconduct or physical violence committed against, with or in the presence of a child, behaviour causing significant emotional or psychological harm to a child, or significant neglect of a child
- racial or religious vilification
- striking another employee or member of the public, or otherwise inflicting harm on, or endangering the life of, another person
- wilfully damaging property
- unlawful discrimination or sexual harassment
- sexual or other criminal offences
- improper use of information, or Department resources, for private purposes or personal gain
- refusal to obey a lawful instruction
- alcohol or drug misuse affecting the employees performance of their duties
- serious or gross negligence
- inappropriate use of the internet or the Department’s information technology resources including for example accessing pornography
- medical certificate fraud
- conduct involving dishonesty, wilfulness or recklessness, loss or damage

Misconduct may include conduct outside, as well as inside, the workplace – for example where the employee has failed to maintain the general standards of conduct required in the Public Sector.

## Sexual harassment

The Department has a [Sexual Harassment Policy](#) that sets out the rights and obligations of all persons in the workplace in relation to sexual harassment. Sexual harassment, if substantiated, may constitute misconduct. Sexual harassment

allegations are to be handled in accordance with the processes in the Guidelines (ie. Complaints and/or Misconduct).

## Sexual assault

Sexual assault involving employees is a criminal offence and the police must be contacted. The manager must also contact the Department's Employee Conduct Branch.

Alleged sexual offences against children and young persons may be 'reportable conduct' allegations (see above), and have mandatory reporting implications. For information on the Department's 'protecting children protocol' and 'mandatory reporting' see the health and wellbeing section of the Department's website at:

<http://www.education.vic.gov.au/childhood/parents/health/Pages/childprotection.aspx>

The Department has guidelines for use when responding to allegations of student sexual assault in Victorian Government Schools. Refer to the Department's website for or more information on:

- [Responding to allegations of student sexual assault](#)
- [Student Critical Incident Advisory Unit](#)

## Suspected criminal offences

Managers should report suspected criminal conduct to the Victoria Police and immediately advise the Employee Conduct Branch. Where the Victoria Police report to the manager, or he or she becomes aware that an employee is the subject of a police investigation, the manager should immediately contact the Employee Conduct Branch.

Where an employee is the subject of a police investigation, the Department must take care not to interfere with the police investigation. Even when the police are involved, the Department has certain responsibilities to fulfil and is entitled to determine appropriate action in terms of the employee's employment. However, close liaison with the Employee Conduct Branch and the police is necessary to ensure that the police investigation is not compromised in any way.

The Employee Conduct Branch is the Department's main liaison point with the Victoria Police in respect of employee conduct that may be considered to be a criminal offence.

Where allegations that are the subject of a misconduct procedure are also the subject of a criminal investigation or criminal proceedings, the employer is not required to

delay or cease the misconduct procedure but the employer may exercise its discretion to do so.

## Procedural Fairness

For matters involving alleged misconduct, any disciplinary action will be consistent with the principles of procedural fairness to ensure an employee has access to natural justice. In relation to VPS employees, this means:

- All parties involved in the procedure will commit to completing it as quickly as practicable.
- The employer must take into account any reasonable explanation of any failure by the employee to participate, before making a decision.
- Before commencing the misconduct procedure, the employer must:
  - tell the employee the purpose of any meeting
  - provide the employee with a copy of these Guidelines
  - provide a reasonable opportunity for the employee to seek advice, including obtaining advice from their Union before any procedure commences
  - allow the employee the opportunity to provide details of any mitigating circumstances.

These points are also reflected in the procedural steps below.

## Admissions by employee

The employee may at any stage elect to admit the allegations. If the employee admits all of the allegations, the employer will proceed to the determination of discipline outcome stage. However, this does not prevent the further investigation of circumstances surrounding the actions of the employee (including actions of other employees). Such further investigation may assist in preventing future similar incidents.

## Misconduct Procedure

Managers who form the view that there may be grounds for action under the Agreement or the *Public Administration Act 2004* must contact the Employee Conduct Branch for advice on the next steps.

Where an employee is alleged to have engaged in misconduct, there will be, consistent with the requirements of procedural fairness:

- an investigation. The investigation may not be necessary where the Employee has elected to admit to the alleged misconduct
- an opportunity for the employee to respond to the findings of the investigation and a recommendation about a proposed discipline outcome, and
- a determination of the discipline outcome by the employer

The employee is entitled to a support person/representative at any formal meeting that is part of the misconduct procedure. The procedure commences at Step 1.

### **Identification of the decision-maker and the investigator**

A person will be identified as the decision-maker in the misconduct procedure. The decision-maker will decide whether to commence formal misconduct procedures.

In most cases, the decision-maker will be the relevant Regional Director, Executive Director, Deputy Secretary or the Secretary, depending on the classification of the person being investigated.

The decision-maker will nominate an investigator. Where appropriate, the investigation may be conducted by the employee's immediate manager (please refer to "Conflict of Interest" in Part 1 of the Guidelines for guidance as to when it may not be appropriate for the employee's immediate manager to conduct the investigation).

If it is not appropriate for the immediate manager to be the investigator, another person will be appointed. This person may be another employee or a person from outside of the Department.

The parties to the complaint may object to the appointed investigator if they can show good cause as to why the investigator should not be appointed. However, the ultimate decision of who to appoint as the investigator rests with the decision-maker.

The misconduct procedures are as follows:

### **Step 1 - Decision on whether to commence a misconduct procedure**

In some cases, it may be useful to conduct a preliminary investigation/inquiry to assess the nature of the allegations of misconduct and determine whether they are such that would warrant commencing formal misconduct proceedings.

In these cases, the manager may consider employing a local complaint process, as set out in Part 3 of these Guidelines.

### Request for submission on Mitigating Circumstances

In all cases where formal misconduct procedures are being contemplated, as soon as practicable after allegations of misconduct have been made against an employee (and after any preliminary investigation, per the person nominated as the decision-maker in this matter will invite the employee to a meeting at which the employee will be provided with the allegations. The employee is invited to provide, within a designated timeframe, details of any mitigating circumstances. They must be given a copy of the relevant part of these Guidelines and clause 21 of the Agreement and reminded of their right to seek advice, including advice from their union before any procedure commences.

If the employee admits all of the allegations, the matter will proceed to the determination of discipline outcome stage.

The decision-maker considers any mitigating circumstances and determines whether or not to commence the misconduct procedures.

### Directions once the procedure has commenced

During the misconduct process, the employer may also do any of the following:

- direct the employee to proceed immediately to perform alternative duties or work at an alternative place of work;
- direct the employee not to speak to other employees of the Department about the matter or not to visit certain places of work;
- suspend the employee with pay.

### Step 2 - Investigation

If a decision has been made to commence the misconduct procedure the decision-maker will nominate a person to investigate the allegations made against the employee, taking into account the considerations outlined under the heading **“Identification of the decision maker and the investigator”** above.

A Written Advice will be provided to the employee containing all of the allegations. The allegations must be sufficient to establish an understanding of the acts, matters or things alleged as the foundation of the charge. Relevant information will only be withheld where it is necessary to withhold that information in order to protect the personal privacy of any other person consistent with Federal or State legislation.

The investigation will include seeking a written response to the Written Advice from the employee. The investigation may also include:

- collecting any relevant materials and evidence;

- speaking with the employee about the allegations
- providing the employee with specific particulars to allow the employee to properly respond to the allegation/s (this may not be necessary if the Written Advice contains all of the allegations)
- speaking with any relevant witnesses and obtaining statements if relevant
- investigating any explanation made by the employee for the purposes of verifying the explanation so far as possible.

Guidance in relation to the interaction with witnesses during an investigation is set out in “Witness” in Part 1 of the Guidelines above.

If further allegations are identified through the investigation, the decision-maker will provide an additional Written Advice identifying these allegations.

### Step 3 – Investigator’s Report

The investigator will prepare a report and make findings as to whether each allegation is substantiated or not substantiated. The findings must be based on a consideration of the relevant facts and evidence. The standard of proof in any misconduct procedures is the balance of probabilities.

In assessing the evidence, the investigator should consider the evidence collected during the investigation. The investigation must be sufficiently thorough to allow the investigator to arrive at a reasonable state of satisfaction that, on the balance of probabilities, the complaint is or is not substantiated. It is not necessary to interview every witness to an incident to arrive at a decision regarding substance.

The standard of proof is a civil standard of the balance of probabilities – that, on the balance of probabilities, it is more likely than not, that the allegation occurred. This standard will increase in accordance with the seriousness and consequences of the allegations. The investigator, however, does not have to be satisfied beyond reasonable doubt (which is the criminal burden of proof).

Where there are no independent witnesses to provide evidence, the investigator may make a decision based on the credibility of the parties involved. ‘Hearsay’ evidence (that is, evidence provided by a person who did not witness the event or matter in question) may be relied upon, but may be given less weight than direct evidence.

Where the investigator makes a finding that an allegation is not substantiated, the procedure will conclude in relation to that allegation and the employee will be informed of this at the appropriate time.

When an adverse finding is made against the employee, they will be provided with a copy of the report to the decision-maker and advised that a written response may be

provided directly to the decision-maker within a suitable time frame, being not less than seven (7) and up to fourteen (14) days of receiving the report.

#### Step 4 – Discipline outcomes

The decision-maker will consider the report provided by the investigator and the employee's response, if one is provided, and will assess the material. It is also open to the decision-maker to request the investigator to conduct a further investigation and provide a further report to the decision-maker on any aspect of the investigation.

Based on all of the material provided, the decision-maker will form a preliminary view on the matter and will propose a discipline outcome. The decision-maker will invite the employee to make a submission in writing to the decision-maker within 14 days addressing the preliminary view.

The discipline outcome must not be disproportionate to the seriousness of the matter. The possible discipline outcomes are:

- no action
- performance management
- formal counselling
- formal warning
- final warning
- assignment of the employee with or without their agreement to a role at a classification level or value range lower than the employee's current classification level or value range
- transfer of the employee with or without their agreement to a different work location at the employee's current classification level
- termination of employment.

Some performance management options may include coaching or mentoring, re-training and professional development, monitoring and increased supervision, counselling and mediation.

If the decision-maker proposes to implement a discipline outcome that is short of termination, the decision-maker may also consider proposing other non-disciplinary outcomes to provide the employee with the opportunity to reach the required standards of conduct or performance.

When considering the proposed discipline outcome, the decision-maker should consider:

- whether the incident is an isolated one or whether the conduct has occurred previously
- the nature and seriousness of the incident, including the effect and circumstances
- whether the employee is aware of the required standard of behaviour that has been breached, and the consequences of breaching it
- any mitigating or extenuating circumstances
- the employment history and general behaviour of the employee
- the length of the employee's service
- the skill, experience and position held by the employee
- the reputation of the organisation
- the impact of the sanction on the employee
- previous advice/counselling in relation to the same or other behaviour
- how other employees have been treated in similar circumstances
- whether there is an ongoing risk to the public, clients or work colleagues;
- whether the employee has admitted to the inappropriate behaviour.

Following consideration of any submission from the employee, the decision-maker will make a decision and advise the employee of the outcome in writing, including the reasons for making the decision and a copy will be placed on the employee's personnel file. The decision maker will be responsible for ensuring that the outcome is implemented.

### Reasons for the decision

Giving reasons for a decision is one of the basic principles of natural justice. It is therefore important that a decision-maker gives reasons for their decision and if a discipline outcome is applied, the reasons for the discipline outcome. The reasons for a decision should include:

- the decision made
- the reasons for the decision
- the sources of the information relevant to the decision
- any discipline outcome and the reasons for that outcome including any mitigating factors



- any rights of the person affected, including any rights of objection, review or appeal.

### **Informing employee who instigated complaint**

If a process was conducted in accordance with this clause because of a complaint of misconduct by another employee, the decision-maker or the manager must advise that employee that the complaint has been dealt with in accordance with these guidelines, and may provide the employee with other information as is reasonably practicable, taking into account relevant privacy considerations. The Employee Conduct Branch will assist with this correspondence.

**For information on appeals/reviews, see Part 6 of these guidelines.**

## PART 5 GUIDELINES FOR MANAGING UNSATISFACTORY PERFORMANCE

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### Introduction

**Managers must contact the Employee Conduct Branch for advice prior to the commencement of the unsatisfactory performance procedures.**

The purpose of the unsatisfactory performance procedures is to assist and support the employee to improve his or her performance and to attain and maintain a satisfactory standard of performance.

Effective performance management arrangements seek to continuously improve the way work is undertaken to achieve gains in productivity and quality. High performance of employees is dependent on the commitment and willingness of managers and employees to actively use performance management procedures, and for managers to recognise and acknowledge good performance, encourage improved performance, and to address unsatisfactory performance.

The assessment of the employee must be against the standards of performance and conduct that are expected of that person at their level. All employees have set duties which they are required to undertake as part of their role. Established performance and development arrangements provide employees with a clear understanding of the standards of performance they are expected to achieve in undertaking their duties.

While established performance and development arrangements provide opportunities for performance assessment and development, a repeated failure to meet the standards may necessitate the commencement of the unsatisfactory performance procedures. Managers should address unsatisfactory performance as soon as they become aware of it and not wait until an employee's annual performance and development assessment is due to raise concerns about an employee's performance.

*Note: Where the unsatisfactory performance procedures have been implemented, the normal performance and development process will not take place and salary progression, if applicable, will be suspended.*

### What is Unsatisfactory Performance?

Unsatisfactory performance is the repeated failure of the employee to discharge his or her duties in the manner expected of the employee at his or her level, in his or her position, as evidenced by one or more of the following—

- a. the negligent, inefficient or incompetent discharge by the employee of his or her duties;
- b. the failure by the employee—
  - (i) to exercise care and diligence in performing his or her duties or
  - (ii) to perform any of his or her duties;
- c. the employee engaging in unsatisfactory conduct that impacts on the discharge of his or her duties including, without reasonable excuse—
  - (i) contravening or failing to comply with a lawful direction given to the employee by a person with authority to give the direction or
  - (ii) being absent from his or her duties without permission.

The standards of performance and conduct of employees are set out in a number of instruments including:

- The Agreement.
- Department policy and guidelines.
- The Victorian Public Sector Code of Conduct.
- The employee's job description.

### **Considerations prior to commencing unsatisfactory performance procedures**

Prior to commencing unsatisfactory performance procedures, the manager must consider organisational or personal factors that play a role in the employee's underperformance and consider alternatives to the unsatisfactory performance procedures to address the problem. Further, the manager must have a reasonable expectation that the employee is capable of meeting the required level of performance before embarking on the unsatisfactory performance procedures. Where the manager and employee agree that the employee is not capable of meeting the required level of performance the Department may transfer the employee to a suitable alternative position where reasonably practicable.

Organisational and personal factors can have a negative influence on the quality of an individual's performance. Organisational factors that may affect performance could include such things as internal structure and arrangements, clarity of work expectations, access to training and development, the quality of the working environment and procedures for providing feedback.

Issues of a personal nature, such as health, personal relationships and career direction, can also affect performance. Sensitivity will need to be exercised in recognising and dealing with these factors, and the Department's Employee Health Unit is available to provide information on the services that are available to assist employees in this situation.

In cases where the manager considers that organisational or personal factors play a role in the employee's unsatisfactory performance, further support, in addition to the implementation of the unsatisfactory performance procedures may be appropriate and effective in addressing the problem.

Where it is considered that counselling may be appropriate this can be arranged through the Department's [Employee Assistance Program](#) (EAP). The telephone contact number for employees wishing to access the EAP is 1800 337 068.

The EAP comprises two elements:

- A short-term solution focused confidential counselling service consisting of up to four sessions for any work related or personal issue for individuals.
- A dedicated Manager Assist telephone advisory service to provide management advice and support to managers.

It is intended that the EAP will provide early and effective support to employees requiring assistance as well as supplement the other important support services provided by the Employee Safety and Wellbeing Branch of the Department. The EAP may also assist employees finding a disciplinary procedure stressful or who wish to debrief at the end of the procedure.

## General principles regarding unsatisfactory performance

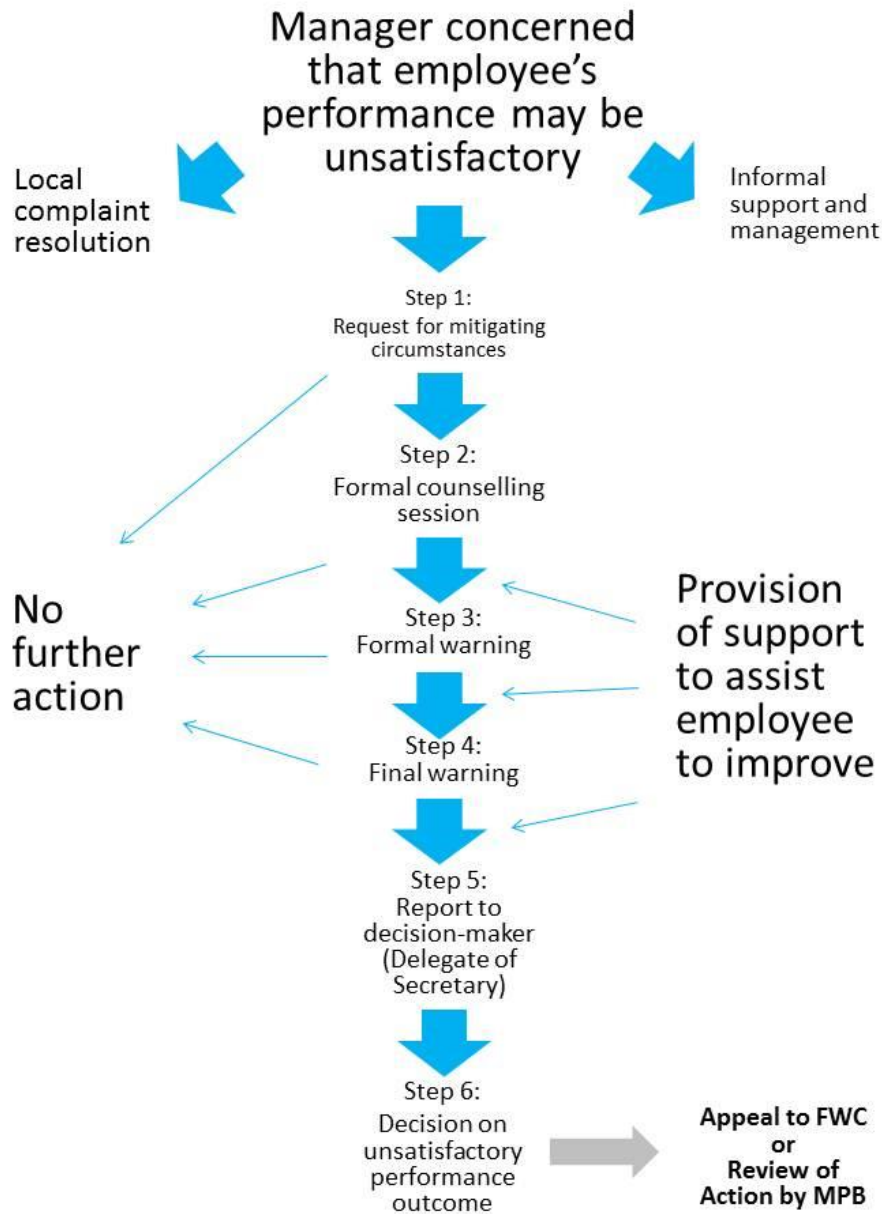
For matters involving unsatisfactory performance under the Agreement, any disciplinary action will be consistent with the principles of procedural fairness. This means:

- All parties involved in the process will commit to completing it as quickly as practicable.
- The employer must take into account any reasonable explanation of any failure by the employee to participate, before making a decision.
- Before commencing a formal unsatisfactory performance process, the employer must:
  - tell the employee the purpose of any meeting
  - provide the employee with a copy of the Guidelines

- provide a reasonable opportunity for the employee to seek advice from the Union before any procedure commences
- allow the employee the opportunity to provide details of any mitigating circumstances.

Where the employer considers that informal attempts to address an employee's unsatisfactory work performance have been unsuccessful, and following consideration of any mitigating circumstances, the employer may proceed to manage the employee's unsatisfactory work performance in accordance with these Guidelines.

## Unsatisfactory Performance Procedures



**Managers must contact the Employee Conduct Branch prior to the commencement of the unsatisfactory performance procedures. The Employee Conduct Branch will assist managers in the implementation of these procedures.**

## Step 1 - Decision on whether to commence unsatisfactory performance procedure and advice about unsatisfactory performance

In making a decision on whether to commence the unsatisfactory performance procedures under the Agreement, the following process will be conducted.

Where a manager considers that an employee's performance may be unsatisfactory, the manager will arrange a meeting with the employee in order to decide whether to commence the unsatisfactory performance procedure. The employee may invite a representative to the meeting. The manager must tell the employee the purpose of the meeting, which is to advise the employee of the unsatisfactory performance (the areas and the standards) and hear whether there are any mitigating circumstances. At the meeting the manager will provide the employee with a letter which contains the following advice (the first letter):

- That his or her performance may be unsatisfactory;
- The areas of alleged unsatisfactory performance;
- The required standard of performance;
- That the manager is considering commencing the unsatisfactory performance procedure and the employee is invited to provide details of any mitigating circumstances. (Mitigating circumstances may include organisational or personal factors that play a role in the employee's unsatisfactory performance);
- That if the employee continues to fail to meet the required standard the employee's unsatisfactory performance may ultimately lead to disciplinary action which may result in dismissal;
- That the employee has three working days (or such longer period as the manager considers reasonable in the circumstances) to explain any reasons for the unsatisfactory performance;
- That the employee may seek advice from their Union before the unsatisfactory performance procedure commences;
- That a copy of these Guidelines is attached to the letter.

After consideration of the employee's response, or following a failure by the employee to respond within the set period, the manager must decide whether to commence the unsatisfactory performance procedure under the Agreement. Prior to commencing the process, the manager must be satisfied that he or she has considered any organisational or personal factors that might play a role in the employee's underperformance and alternatives to the unsatisfactory performance process to address the problem.

Once a decision has been made about whether or not to commence the unsatisfactory performance procedures the manager will either:

- Notify the employee in writing that no further action under these procedures will be taken at this time and advise of the consequences of further instances of unsatisfactory performance (a copy of this letter should be placed on the employee's personnel file); or
- go to the Formal Counselling stage.

## **Step 2 – Formal Counselling Session**

The first stage of the formal unsatisfactory performance procedures requires the manager to invite the employee to a counselling session where the manager will:

- clarify with the employee the areas of unsatisfactory performance which were outlined in the first letter
- identify the standards required of the employee
- advise the employee of the consequences of not improving his or her performance within a reasonable time (between 2 and 6 weeks)
- provide the employee with an opportunity to respond to these issues within a reasonable timeframe.

The employee may invite a representative or support person to the meeting.

The support provided to the employee to improve their performance may include any or all of the following:

- increased supervision
- changes to the Employee's performance plan
- mentoring
- training and professional development
- increased feedback
- coaching

A record of the formal counselling session will be placed on the employee's personnel file, along with the first letter advising of the unsatisfactory performance.

## **Step 3 – Formal Written Warning**

Where a manager considers that an employee's performance has not sufficiently improved within a reasonable period of time following the Counselling Session, the



manager will write to the employee to propose that a formal written warning will be issued and a support and monitoring period will commence. The letter will also state:

- that the employee's performance is considered to be unsatisfactory
- the areas of unsatisfactory performance
- the required standard of performance
- that the employee has three working days (or such longer period as the manager considers reasonable in the circumstances) to respond to these matters and:
  - the proposal that a formal written warning be issued and a support be provided, and
  - suggest any support that the employee may find useful if the proposal goes ahead.

After considering the employee's response or in the absence of a response within the specified period, the manager may issue a formal written warning stating:

- that his or her performance is considered to be unsatisfactory
- the areas of unsatisfactory performance
- the required standard of performance
- the support, where relevant, that will be provided to assist the employee to improve his or her performance and how feedback will be provided
- how the performance will be monitored
- the timeframe during which the employee's improvement is expected to improve
- that if the employee continues to fail to meet the required standard the employee's unsatisfactory performance may be managed in accordance with clause 20 of the Agreement which may ultimately result in dismissal, and
- That a copy of this written warning will be placed on the employee's personnel file.

The period of time provided for the employee to improve will depend on the circumstances. It may be between 20 and 50 working days or such other time as the manager considers appropriate. In determining the timeframe the manager will need to consider what is reasonably required to improve the performance in the identified area(s) and any previous actions taken to support improved performance.

Support may involve, but is not limited to, increased supervision, changes to the employee's performance plan, mentoring, training and professional development, increased feedback or coaching.

Where an employee who is subject to unsatisfactory performance procedures is absent due to illness or another form of approved leave expected timeframe for improvement would normally be extended.

**Support is provided in an overall context that recognises that individuals are ultimately responsible for their own performance.**

It may be appropriate for the support available to the employee to be progressively reduced to allow the employee to demonstrate the achievement of the required standards in the context of the usual professional support available for employees.

The manager should ensure that accurate records are kept. Copies of these records must be provided to the employee. These records will form part of any report to the Secretary. These records will be important during any subsequent appeal proceedings.

#### **Step 4 - Final Written Warning**

If there is insufficient improvement in the employee's performance, the manager will propose a final written warning and additional period of time for the employee to demonstrate satisfactory improvement.

The steps required for the provision of the final warning are identical to those outlined above for the formal written warning save that any additional period of time provided to the employee to demonstrate satisfactory performance would typically be shorter—between 5 and 40 days, or as otherwise deemed appropriate.

#### **Step 5 – Preparation of a Report**

If the employee's performance continues to be below the required standard, the manager will prepare a report for the consideration of the decision-maker (delegate of the Secretary).

A copy of this report must be provided to the employee who is invited to provide a written response to the report directly to the decision-maker.

The report must include all supporting documentation that has been relied on throughout the process.

## Step 6 – Decision on Unsatisfactory Work Performance Outcome

The evidence from the unsatisfactory work performance procedure will be used to determine the outcome.

The decision-maker will therefore consider the report and any response from the employee, and will assess the material. Based on all of the material provided, the decision-maker will form a preliminary view on the matter and will propose an Unsatisfactory Work Performance outcome. The decision-maker will invite the employee to make a submission in writing within 14 calendar days addressing the preliminary view.

Following consideration of any submission from the employee, the decision-maker will make a decision, outlining the reasons for it and advise the employee of the outcome in writing and a copy will be placed on the employee's personnel file.

The possible unsatisfactory work performance outcomes are:

- assignment of the employee with or without their agreement to a role at a classification level or value range lower than the employee's current classification level or value range; or
- termination of employment.

The decision-maker will be responsible for ensuring that any outcome is implemented.

## PART 6 RIGHTS OF REVIEW AND APPEAL

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### Review of Action

In accordance with the *Public Administration Act 2004* and the *Public Administration (Review of Action) Regulations 2005*, VPS employees under the *Public Administration Act 2004* have a right to lodge a review of action with the Merit Protection Boards. The Department's HRWeb contains comprehensive information on review of actions. For further information, see: [www.education.vic.gov.au/hrweb/pages/default.aspx](http://www.education.vic.gov.au/hrweb/pages/default.aspx)

### Disputes and Grievances under the Agreement

A dispute or grievance about a matter arising under the Agreement other than termination of employment will be dealt with in accordance with clause 12 of the Agreement. Clause 12.4 of the Agreement provides that a person bound by the Agreement may choose to be represented at any stage by a representative, including a CPSU representative or employer's organisation.

Any dispute or grievance arising under clause 20 or 21 of the Agreement may only be dealt with in accordance with clause 12 (Resolution of Disputes) of the Agreement when one or more of the following is placed on the employee's personnel file. This may include whether clauses 20.5 or 21.6 of the Agreement (concerning procedural fairness) have been complied with in coming to a decision.

- a record of formal counselling
- a formal written warning
- a final written warning
- a notification given to the Employee
- a record of unsatisfactory work performance outcome
- a record of discipline outcome.

### Fair Work Commission

Under the *Fair Work Act 2009* Fair Work Commission deals with two main types of applications that can be made in response to dismissal:

- unfair dismissal
- dismissal where there has been a breach of the 'general protections'.

In general, an employee cannot pursue more than one type of dismissal application at the same time. For further information, contact:

Fair Work Commission. Contact details: Telephone 1300 799 675, Website: [www.fwc.gov.au](http://www.fwc.gov.au)

## FURTHER ASSISTANCE

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For advice or assistance on any matters related to the management of complaints, misconduct or unsatisfactory performance contact the Employee Conduct Branch on (03) 9637 2595.