



# Guidelines to the Misconduct Process

ACT Public Sector Standards Commissioner

October 2019

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## BACKGROUND

The ACT Public Sector is underpinned by the ACTPS values of Respect, Integrity, Collaboration and Innovation and signature behaviours that all people employed under the Public Sector Management Act are expected to demonstrate. The ACTPS signature behaviours embody the principles of decency, courtesy, professionalism and fairness and exemplify ways of working and the workplace culture that the ACTPS strives to nurture.

The purpose of a misconduct process is to uphold the values of the ACTPS and to prevent further misconduct. The process needs to be transparent, thorough and purposeful and should be conducted in a manner which respects the rights of all individuals involved.

It is important to remember that an individual who is the subject of a misconduct process deserves to be treated with respect, courtesy, professionalism and fairness. The impact of a misconduct process on an employee can be significant and is not just limited to the impact of any sanction. This is particularly relevant where an employee has been suspended or transferred as part of the process.

### Summary of process

Generally, allegations of misconduct arise through observation or allegations made by other employees, managers or members of the public.

A preliminary assessment in the relevant Directorate determines whether there is a need for a misconduct investigation, whether the matter can be resolved informally or whether the matters should be referred to other authorities in cases of serious conduct. An assessment will also be made as to whether the employee subject of the allegations can continue to perform their duties or whether or not a transfer or suspension is necessary.

Where a matter needs to be investigated the Directorate will refer the matter to the Public Sector Standards Commissioner for investigation by the Professional Standards Unit. Following investigation, the Public Sector Standards Commissioner, or their delegate, will make a finding of misconduct and if misconduct is found to have occurred, the matter will be referred to the Directorate for a decision on possible sanction.

The misconduct process must be undertaken with diligence and without unnecessary delays and it is expected that Directorates and the Professional Standards Unit will work closely together on each matter to achieve this.

This Guideline provides the details and processes for how misconduct matters are addressed in the ACT Public Sector.

## INTRODUCTION

This document is intended as a guide for ACT Public Sector (ACTPS) Human Resource (HR) teams, Investigators and Delegates in managing the misconduct process. The objective of these procedures is to ensure fair, independent and consistent misconduct processes across the ACTPS.

The Guidelines provide information on the processes, roles and outcomes associated with managing and resolving allegations of misconduct, both under Section H<sup>1</sup> (Workplace Values and Behaviour) of ACTPS Enterprise Agreements for employees, and under the Public Sector Management Standards for Senior Executive Service (SES) staff members.

An investigation will determine whether there is sufficient evidence to support the contention that the alleged behaviour occurred and will allow the Delegate to determine whether that behaviour constitutes misconduct, as defined in the ACTPS legal framework.

These guidelines are supported by the following documents, which are available on the ACTPS Employment portal ([www.cmtedd.act.gov.au/employment-framework](http://www.cmtedd.act.gov.au/employment-framework)) and are aimed at providing additional information to manage and resolve inappropriate behaviour in the workplace:

- A. Preliminary assessment – a guide for managers/supervisors
- B. Resolving workplace issues – information for employees
- C. Resolving workplace issues – information for managers
- D. Factsheet – what to expect if you are a complainant in a misconduct investigation
- E. Factsheet – what to expect if you are a witness in a misconduct investigation
- F. Factsheet - what to expect if you are a respondent in a misconduct investigation

Information relating to Public Interest Disclosure (PID) procedures are not contained within this document. The *Public Interest Disclosure Guidelines* is a notifiable instrument located on <https://www.legislation.act.gov.au/ni/2019-281/> and a factsheet on PIDs is available on the ACTPS Employment portal.

The ACTPS Enterprise Agreements also contain a right of appeal on certain misconduct decisions. This document does not cover this – it is included in the ACTPS Appeals Manual, which is also available on the ACTPS Employment portal.

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<sup>1</sup> The Workplaces Values and Behaviours section of some ACTPS Enterprise Agreements is not entitled section H; however the content of the section is consistent across the Agreements. This document will cross-reference to clauses and subclauses of Section H where the information is relevant to Enterprise Agreement provisions.

# PART 1 – THE MISCONDUCT FRAMEWORK

## Legal Framework

Misconduct investigations in the ACTPS are conducted by the Professional Standards Unit (PSU), under the auspices of the ACT Public Sector Standards Commissioner (the Commissioner) and in accordance with the provisions of the relevant ACTPS Enterprise Agreement, the *Public Sector Management Act 1994 (PSM Act)* and the *Public Sector Management Standards 2016 (PSM Standards)*.

The provisions that apply to SES members are located within the PSM Act and the PSM Standards. See Part 12 of this document for further information relating to misconduct processes for SES members.

## Application to Probationary, Casual or Temporary Employees

For officers on probation, eligible casual employees or temporary employees the Head of Service (or their delegate) may determine that the procedures in Section H of the relevant Enterprise Agreement apply on a proportional basis, according to the circumstances of the case. However, procedural fairness must still be applied, and the adjusted process needs to be communicated to the employee when an investigation commences.

## Definition of terms

### **Allegation**

An allegation is an unproven statement that someone has behaved inappropriately.

### **Complainant**

A person who makes a complaint concerning an allegation of inappropriate behaviour by an ACTPS employee or a workplace issue.

### **Delegate (Decision-maker)**

The ACTPS employee who is authorised, under a delegation of power, to make a decision.

### **Disciplinary Action**

Action arising from a misconduct process, which may include sanction, counselling, remedial action and/or formal direction.

### **Respondent**

The ACTPS employee against whom an allegation of inappropriate behaviour or a workplace issue has been raised.

### **Sanction**

A penalty listed in the Enterprise Agreement.

### **Workplace issue**

Workplace issues are different kinds of behaviour that disrupt the organisation and typically centre on behaviour that is, at least, perceived as inappropriate or unwanted and may be inconsistent with the ACTPS values and behaviour considered appropriate conduct by a public employee.

## Defining Misconduct

Misconduct is defined in the ACTPS Enterprise Agreements (**subclause H6.5**) as:

**Misconduct** includes any of the following:

- H6.5.1 *the employee fails to meet the obligations set out in section 9 of the PSM Act 1994;*
- H6.5.2 *the employee engages in conduct that the head of service or the Public Sector Standards Commissioner is satisfied may bring, or has brought the Directorate of the ACTPS into disrepute;*
- H6.5.3 *a period of unauthorised absence and the employee does not offer a satisfactory reason on return to work;*
- H6.5.4 *the employee is found guilty of, or is convicted of a criminal offence or where the court finds that an employee has committed an offence but a conviction is not recorded, taking into account the circumstances and seriousness of the offence, the duties of the employee and the interests of the ACTPS and/or the Directorate;*
- H6.5.5 *the employee fails to notify the head of service of criminal charges in accordance with clause H12; or*
- H6.5.6 *the employee makes a vexatious or knowingly false allegation against another employee.*

Please refer to Part 12 of this document for information relating to definitions of misconduct relevant to SES members.

The ACTPS Enterprise Agreements in turn refer to *section 9 of the PSM Act 1994*.

### **9 Public sector conduct**

- (1) A public servant must—
  - (a) take all reasonable steps to avoid a conflict of interest; and
  - (b) declare or manage a conflict of interest that cannot reasonably be avoided; and
  - (c) when acting in connection with the public servant’s job—
    - (i) comply with laws applying in the Territory; and
    - (ii) comply with any lawful and reasonable direction given by a person with the authority to give the direction; and
    - (iii) if dealing with a member of the public—make all reasonable efforts to help the person to understand the person’s entitlements, and any requirement the person is obliged to meet, under a territory law; and
    - (iv) treat all people with courtesy and sensitivity to their rights and aspirations; and
  - (d) do the public servant’s job with reasonable care and diligence, impartiality and honesty.



- (2) A public servant must not—
- (a) behave in a way that—
    - (i) is inconsistent with the public sector values; or
    - (ii) undermines the integrity and reputation of the service; or
  - (b) take improper advantage of the public servant’s job or information gained through the public servant’s job; or
  - (c) improperly use a Territory resource, including information, accessed through the public servant’s job; or
  - (d) without lawful authority—
    - (i) disclose confidential information gained through the public servant’s job; or

*Note* The [Crimes Act 1900](#), s 153 (1) makes it an offence for a public servant to disclose information that it is the public servant’s duty not to disclose.

    - (ii) make a comment that reasonably appears to be an official comment; or
  - (e) when acting in connection with the public servant’s job—bully, harass or intimidate anyone; or
  - (f) when doing the public servant’s job—apply improper influence, favouritism or patronage.

## Serious Misconduct

Serious misconduct is misconduct of such a nature that, if proven, is considered to be inconsistent with the continuation of the employee’s employment and may result in the employee’s dismissal (see **subclause H6.6**). Examples of serious misconduct, as outlined within the *Fair Work Regulations 2009*, include:

- wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment;
- engaging in theft, fraud or assault, or being intoxicated at work;
- employees refusing to carry out a lawful and reasonable instruction that is consistent with their contract of employment; and
- conduct that causes imminent and serious risk to:
  - the health or safety of a person; or
  - the reputation, viability or profitability of the organisation’s business.

Serious misconduct can result from instances not outlined above, which are made serious due to the type or nature of employment. Each case needs to be looked at individually and in context - what may constitute an act of misconduct or serious misconduct in one work environment may not constitute an act of misconduct or serious misconduct in another.

Related information on **Summary Termination** is contained in Part 5 of this document.

## Procedural fairness

Procedural fairness requires that a fair and proper procedure be used when making a decision. The term 'natural justice' has a similar meaning to 'procedural fairness' and the terms are commonly used interchangeably, however the term 'procedural fairness' will be used within this document.

The rules of procedural fairness require:

- an inquiry into the matters in dispute;
- a hearing appropriate to the circumstances;
- a lack of bias; and
- evidence to support any decision made.

In broad terms, procedural fairness requires a decision-maker to:

- inform people against whose interests a decision may be made of the allegations against them or grounds for adverse comment in respect of them;
- provide those people with a reasonable opportunity to put their case forward;
- hear all parties to a matter and consider submissions;
- make reasonable inquiries or investigations before making a decision;
- ensure that no person decides a case in which they have a direct interest;
- act fairly and without bias, and
- conduct the investigation without undue delay.

Any decision affecting an individual must afford that individual procedural fairness.

## PART 2: ROLES AND RESPONSIBILITIES

### ACT Public Sector Standards Commissioner

The ACT Public Sector Standards Commissioner (the Commissioner) has the following functions:

- (a) to conduct investigations—
  - (i) about a matter declared by the Chief Minister in the way prescribed; and
  - (ii) under an industrial instrument;
- (b) to provide advice to the Chief Minister about matters arising from an investigation conducted by the Commissioner;
- (c) in connection with an investigation conducted by the Commissioner—to promote and provide advice about the public sector values, the public sector principles and the conduct required under the *Public Sector Management Act 1994*; and
- (d) to exercise any function given to the Commissioner under the *Public Sector Management Act 1994* or another law applying in the Territory.

(Section 144 of the *Public Sector Management Act 1994*)

Under Section H of the ACTPS Enterprise Agreements, allegations of misconduct are referred to the Commissioner for independent investigation.

The Commissioner may determine that an investigation will not resolve the matter and refer it back to the Directorate for alternative resolution or consideration. If the Commissioner accepts the referral, an appropriately trained person will be appointed to conduct the investigation.

The Commissioner may, at any time, decide to instigate an investigation of alleged misconduct, in the absence of a referral from the Directorate, if satisfied that the matter warrants investigation.

Under clause H10 of the Enterprise Agreements, the Commissioner (or their delegate) makes a proposed finding, on the balance of probabilities, as to whether misconduct has occurred.

### Professional Standards Unit

The Professional Standards Unit has the key responsibility to:

- provide advice to the ACTPS regarding the management of inappropriate behaviour in the workplace;
- conduct or co-ordinate misconduct investigations in an independent and timely manner, including raising any issues that may slow or stop the progress of an investigation with the Referral and/or the Misconduct Delegate, as relevant;
- provide training and resources to the ACTPS in relation to the management of misconduct processes;
- collect, analyse and disseminate statistical information relating to behavioural trends and related causes; and
- provide support to the Commissioner as required.

The PSU is not a decision-making body – a delegate is responsible for all decisions relating to the misconduct process.

## **Investigator**

The Investigator will:

- liaise with the relevant Directorate HR personnel to assist with the local management of the matter;
- establish the scope of the investigation with the Referral Delegate;
- provide updates to the Referral Delegate regarding the investigation and liaise regarding decisions that need to be made;
- inform all employees involved in an investigation (i.e. the complainant, witnesses and the respondent) about the process;
- take all reasonable steps to establish the facts of the allegation(s);
- communicate any new allegations identified during the investigation to the Referral Delegate or recommendations relating to the withdrawal of allegations for their consideration;
- inform the respondent, in writing, of the full particulars of the alleged misconduct prior to interview;
- give the respondent a reasonable opportunity to respond to the allegations, by either choosing to attend an interview or to provide a response in writing, or both;
- provide updates to the Misconduct Delegate regarding the investigation and communicate any changes to the preliminary allegations that have been made by the Referral Delegate;
- prepare a written report for the Misconduct Delegate, setting out an objective finding of fact in relation to the allegation(s);
- maintain records of the investigation process; and
- manage any time delays experienced during the investigation, including notifying the Directorate of anticipated or actual delays.

## **Directorate/Agency**

### **Manager/Supervisor**

The key responsibilities of the manager/supervisor are:

- conduct a timely and fair assessment of workplace issues that come to their attention (unless they are involved in the workplace issue or implicated in a complaint);
- seek advice from HR as required;
- determine what, if any, action is required;
- document the assessment process and their decision;
- implement any actions pending as a result of the preliminary assessment; and
- if recommending a misconduct investigation, refer the matter to an authorised delegate for a determination on whether to refer the matter to the Commissioner.

## **HR team**

HR advice is required to facilitate the resolution of complex workplace issues and inappropriate behaviour.

The key responsibilities of the HR teams in relation to this process are:

- provide advice and assistance to managers and employees relating to allegations of inappropriate workplace issues or behaviour;
- assist managers in conducting preliminary assessments;
- facilitate independent preliminary assessments to occur, where required;
- facilitate and co-ordinate restorative or remedial processes;
- contribute to the development of training for managers relating to the management of inappropriate behaviour;
- provide support and advice to the Referral Delegate in determining whether a matter requires investigation;
- co-ordinate the investigation request and relevant documentation to the PSU;
- liaise with the PSU and facilitate any requests for information;
- provide advice to the Referral Delegate in relation to the assessment of any new allegations identified during the misconduct investigation;
- assist the Referral Delegate and the Investigator to develop plans to manage time delays or disruptions;
- notify the Respondent and other relevant parties of any anticipated or actual delays;
- provide support to the Misconduct Delegate and the Sanction Delegate (if relevant) in fulfilling their roles in the misconduct process;
- facilitate the effect of any sanction imposed as a result of a misconduct process; and
- provide information to the PSU and the Commissioner as required.

## **Delegate Functions**

Officers of the ACTPS, when performing some functions in relation to misconduct, do so on behalf of the Commissioner through a delegated power, while other functions are performed by the Director-General or other delegates on behalf of the Head of Service.

It is important to note there are 3 decision points in any misconduct process. This document has separated the role of those making the decisions into the **Referral Delegate**, the **Misconduct Delegate** and the **Sanction Delegate**. Depending on the circumstances of the case, all 3 decisions may be made by the same person. Other cases may require separate or independent decision makers to fulfil all or some of these roles.

### **Referral Delegate**

Following a preliminary assessment, if the manager/supervisor believes a matter warrants formal investigation, it should be escalated to the Referral Delegate for a decision on whether, or not, to refer the matter to the Commissioner for independent investigation.

The Referral Delegate is exercising the authority of the head of service and is appointed by the directorate, through local delegation arrangements.

The key responsibilities of the Referral Delegate are to:

- consider the information gathered during a preliminary assessment;
- seek advice from HR;
- determine whether the matter warrants investigation or other action;
- where investigation is required, refer the matter to the Commissioner;
- notify the respondent that the matter has been referred to the Commissioner for investigation, provide information about the alleged behaviour and the investigative process;
- if applicable, notify the complainant of the investigation;
- assess new allegations of potential misconduct identified during the investigation and the withdrawal of allegations not to be pursued;
- develop plans, in consultation with the Investigator and the HR team, to manage time delays or disruptions; and
- ensure the implementation of any sanction imposed by a Sanction Delegate.

### **Misconduct Delegate**

The Misconduct Delegate will be one of the following options:

- the Referral Delegate;
- an independent Delegate from within the referring Directorate;
- an external Delegate from another Directorate; or
- the Commissioner.

The role of the Misconduct Delegate, as a delegate of the Commissioner, is to determine whether there is sufficient evidence to prove the alleged behaviour occurred or not and, if so, whether the behaviour constitutes misconduct (**clause H10**).

Where issues relating to the perceived independence of a Misconduct Delegate are raised by any party, the Commissioner will assess the issues raised and the suitability of the appointment. The Commissioner will either confirm the appointment of the Misconduct Delegate or recommend an alternative delegate.

The Misconduct Delegate will:

- receive a written report from the Investigator;
- consider all the available evidence;
- if required, request further enquiries be made by the Investigator;
- make an unbiased decision, on the balance of probabilities, as to whether misconduct has occurred or not;
- document the decisions and reasons for the decisions;
- if no misconduct is found to have occurred, notify the respondent of the finding and advise that no sanctions will be imposed;
- if misconduct is found to have occurred, advise the respondent in writing of the proposed determination and reasons for arriving at this decision; provide a copy of the investigation

report to the respondent (if appropriate to do so); allow the respondent a period of time, not less than 14 calendar days, to respond to the proposed determination;

- consider any response from the respondent and make a final determination as to whether misconduct has occurred or not;
- if misconduct is found to have occurred, refer the matter to the Sanction Delegate for consideration; and
- inform the respondent in writing of the outcome and the proposed disciplinary action or, if relevant, that the matter has been referred for consideration of disciplinary action.

### **Sanction Delegate**

In cases where misconduct is found to have occurred, the Sanction Delegate will determine an appropriate outcome (**clause H11**).

The Sanction Delegate is nominated by the head of service (Director-General) and depending on the circumstances of the case, may be:

- the Referral Delegate;
- the Misconduct Delegate;
- an independent Delegate from within the referring Directorate; or
- an external Delegate from another Directorate.

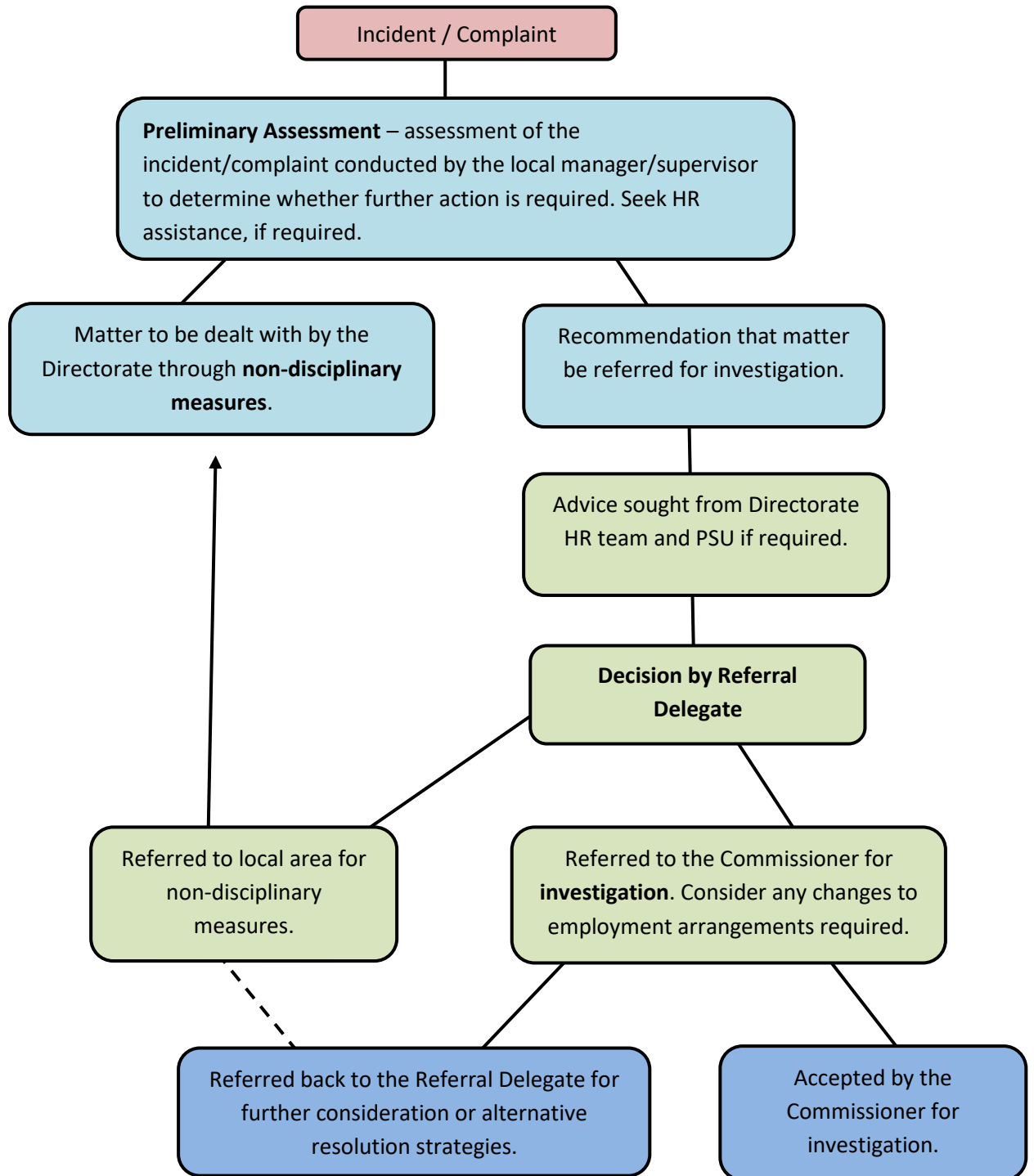
If misconduct is found to have occurred, either through a misconduct investigation or through admissions made by the employee, the Sanction Delegate will:

- consider the information; determine whether disciplinary action is appropriate or not; and if so, propose an appropriate sanction;
- document the decision and reasons for the decision;
- inform the respondent of the proposed sanction(s) and the reasons;
- allow the respondent a period of time, not less than 14 calendar days, to respond to the proposed sanction;
- consider any submission by the respondent and make a final determination relating to disciplinary action;
- inform the respondent in writing of the final outcome and their right of appeal;
- if applicable, inform the complainant of the finalisation of the process;
- ensure the Referral Delegate (if different) is informed of the final sanction to be imposed.

The Sanction Delegate can be the same person as the Referral Delegate or Misconduct Delegate or different. The Sanction Delegate's role is to consider the appropriate sanction and can, at this point, take into account any other contextual information, such as the behaviour in the norm of the Directorate, and any other previous conduct.

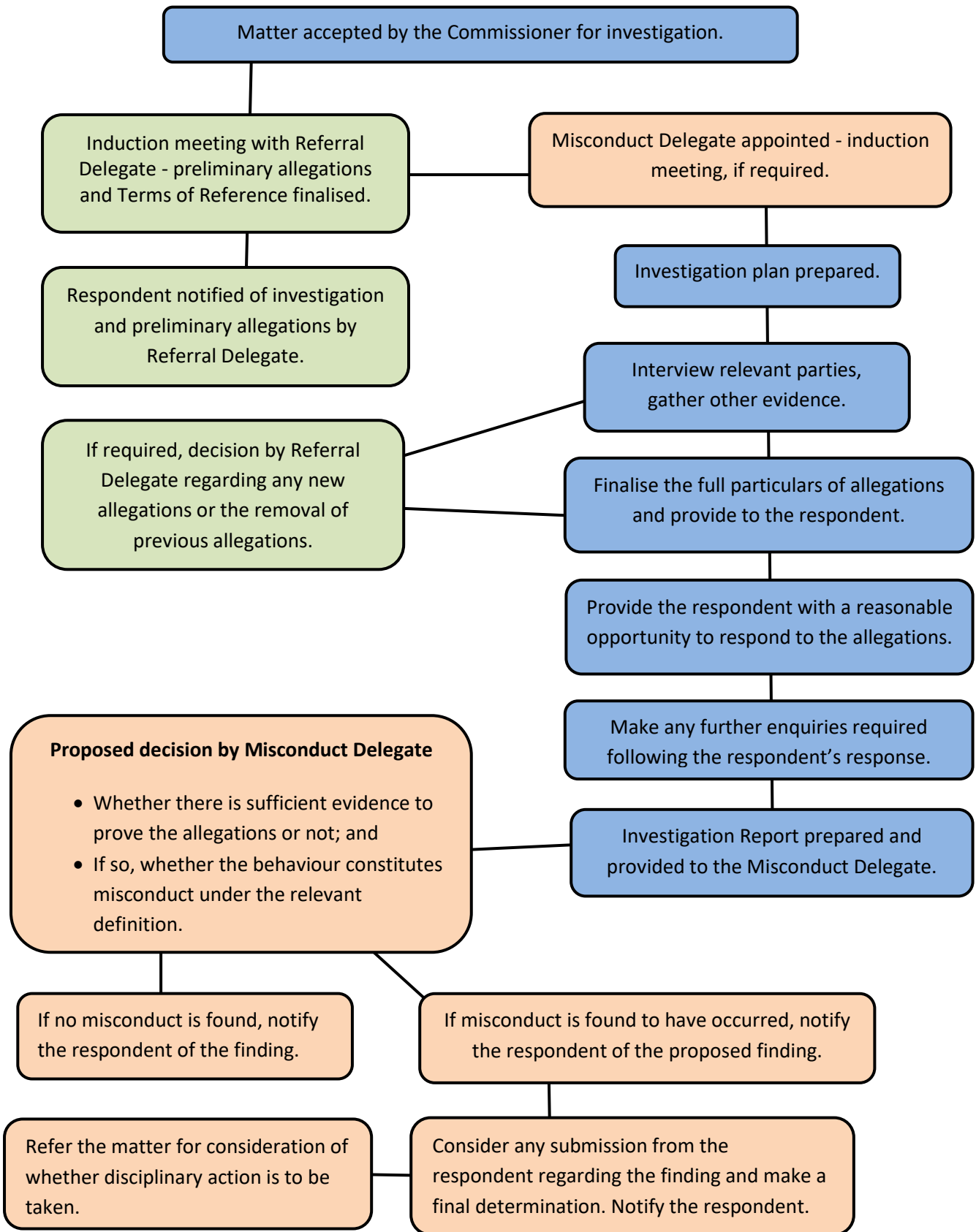
# PART 3: PROCESS FLOW CHARTS

## Preliminary Assessment

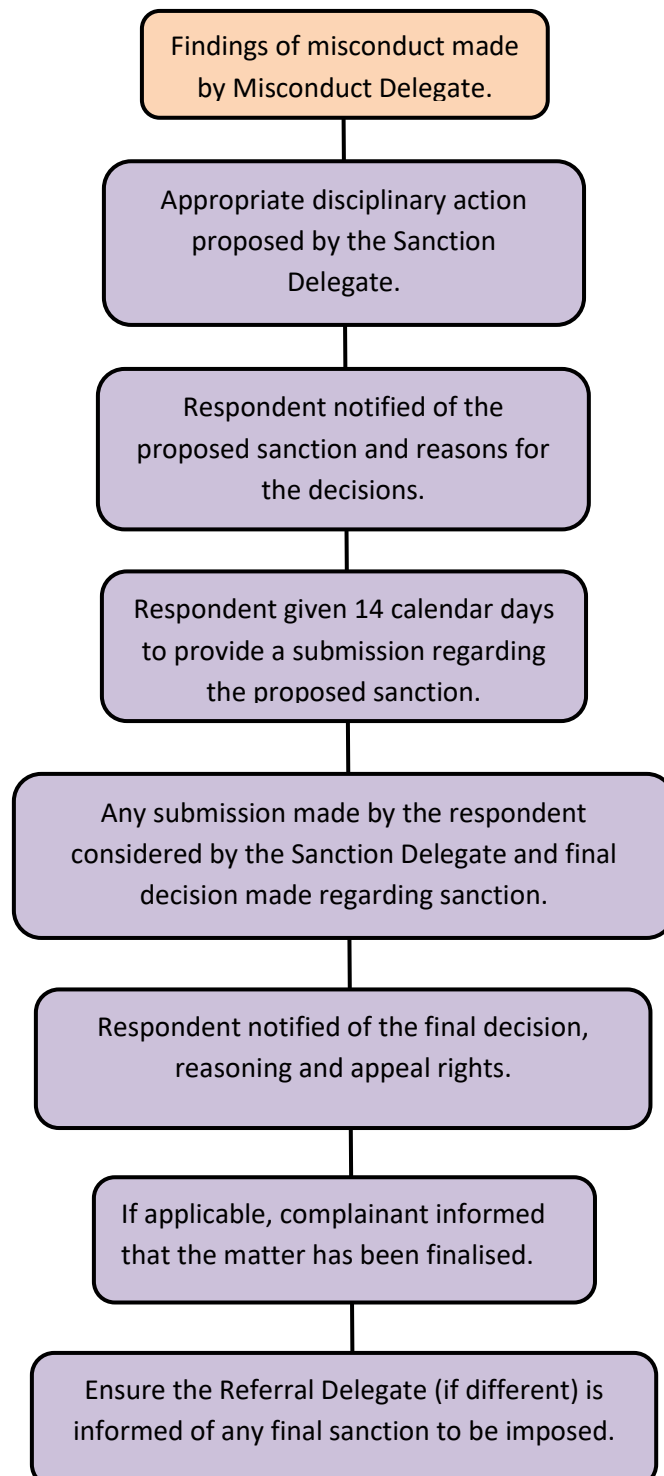




# Investigation



## Disciplinary Action



## PART 4: PRELIMINARY ASSESSMENT

Workplace issues are identified through various avenues, such as observations, Incident/Accident Reports, and/or the receipt of verbal or written complaints. A formal written complaint is not required to initiate action by the ACTPS.

When inappropriate workplace behaviour or possible misconduct is alleged, the ACTPS Enterprise Agreements require that a preliminary assessment is conducted (**subclause H2.1**).

HR advice should be sought by the manager/supervisor during the preliminary assessment as needed.

### What is the purpose of a preliminary assessment?

The purpose of a preliminary assessment is to gather information to determine what further action is required to resolve the matter and address any inappropriate behaviour identified.

Preliminary assessments vary in their scale depending on the circumstances and the complexity of the issues raised. It may be as simple as considering the workplace issue and appropriate options for resolution, or it may extend to a more detailed approach including obtaining documents and speaking to relevant staff about what happened.

Importantly, a preliminary assessment is not an investigation. It is a means of determining if, and how to proceed with the matter to resolve the issues raised. The assessment should be conducted as soon as possible and be as short as practicable.

### Who should conduct a preliminary assessment?

Preliminary assessments should be conducted by the employee's manager/supervisor unless circumstances described in the following paragraph exist. The manager/supervisor may use the services of another independent party to collect the information; however, the manager/supervisor remains responsible for the preliminary assessment and the decisions arising from the process.

If the complaint relates to the manager/supervisor or there is a concern about the independence of the manager/supervisor, an alternative appropriate and independent person should be nominated to conduct the assessment.

The PSU may assist Directorates with preliminary assessments that:

- are of a complex or sensitive nature;
- are of a large scale;
- involve a senior ACTPS SES member; or
- where there is a local conflict of interest that cannot be resolved.

### Informing the employee

The ACTPS Enterprise Agreements (**subclause H2.3**) state:

*The assessment will be done in an expedient manner and generally be limited to having discussions (either verbal or written) about the allegation or incident, with relevant employees, and, if requested, their representatives.*

In most cases, the manager/supervisor should advise the employee who is the subject of the complaint/issue that a preliminary assessment is being conducted, so they can provide any relevant information before a decision is made about how to proceed. This provides confidence that the decision is fair and balanced.

It may not be appropriate to advise the employee that a preliminary assessment is taking place in all cases. Situations where it may not be appropriate to advise the employee include (but are not limited to):

- there is a reason to believe that there is a probable risk that the employee may destroy or remove evidence;
- there is a reason to believe that there is a probable risk that the employee may compromise or interfere with an information source;
- relationships may be damaged, affecting the opportunity for safe operation in the workplace between employees into the future;
- the manager/supervisor believes the allegation may be frivolous, trivial or vexatious; or
- there is a reasonable prospect that no further action will be required.

### Outcomes from the preliminary assessment

Following the preliminary assessment, the manager/supervisor needs to advise the delegate whether:

- no action is required;
- an investigation is required; or
- other action is required to resolve the issues.

Other actions may include, but are not limited to:

- counselling (in accordance with **clause H3**);
- remedial action;
- other support or assistance to the employee(s);
- restorative processes;
- a review of processes;
- workplace cultural strategies.

The local manager/supervisor is responsible for determining what action should be taken from a preliminary assessment, including recommending to a delegate that the matter be referred for investigation. Advice from the Directorate HR team may be valuable in making this determination.

The preferred approach, whenever possible, is to resolve workplaces issues in a non-disciplinary way. When a manager/supervisor decides the matter does not warrant formal investigation, the employee should be advised of the workplace issue(s) and the proposed method of resolution. The employee should be given an opportunity to respond (if they haven't already done so) and agree to the proposed action. For example, the employee may agree to attend training or participate in mediation. This way, the employee is more likely to feel that they are part of the decision.

Not all allegations can be dealt with through alternative resolution or non-disciplinary action. Cases involving serious allegations, where there are contested facts, or where relevant non-disciplinary action has been tried in the past but failed, may require an investigation. If the manager/supervisor believes the matter warrants investigation, it should be escalated to the Referral Delegate for a decision.

In all cases, it is important that action is taken early and in a timely manner and the workplace issue is addressed in some way. A record should be made of any action taken and the reasons for it. The

manager/supervisor will communicate the outcomes to relevant employees and any employee representatives (*sub-clause H2.4*).

## Counselling

Counselling can happen outside of the misconduct process and is an opportunity for the manager and the employee to discuss possible causes and remedies for workplace issues. The employee must be informed what the discussion will be about and be invited to have a support person or representative present.

A formal record of the counselling must be created, including:

- details about the ways the employee's conduct needs to change or improve;
- the timeframe within which these changes or improvements need to occur;
- how progress will be assessed and monitored; and
- if appropriate, a written direction about future expectations, standards and behaviours.

The record of the counselling must be provided to the employee so that they can correct any inaccuracies and provide any comments before signing the record. If the employee elects not to sign the record, then details of the offer and any reasons for refusal should be noted.

Any continued and/or subsequent behaviour by the employee subject to the counselling may result in an underperformance or misconduct process, if appropriate, following a preliminary assessment.

## PART 5: CONSIDERATIONS WHEN DECIDING WHETHER TO REFER FOR INVESTIGATION

While investigations should not normally be the first option, they are sometimes necessary and appropriate. However, they are not a tool to devolve responsibility for managing workplace issues, nor should they be used to address minor matters that could be resolved using non-disciplinary options. The use of a formal investigation to resolve lesser disputes or minor issues can unnecessarily delay the resolution of a matter, restrict managerial initiative, and limit the opportunity for open dialogue and apologies between disputing parties.

Situations where investigations are appropriate include (but are not limited to):

- the alleged behaviour, if substantiated, would be sufficiently serious to justify a sanction as outlined in the ACTPS Enterprise Agreements;
- the allegations are serious and/or there is disagreement about what happened and little prospect of remedial action being agreed to or being practicable;
- the alleged behaviour may constitute a criminal act; or
- the allegation is indicative of a pattern of behaviour by the employee, especially where the employee has been subject to other disciplinary or remedial action for similar conduct in the past.

In considering whether a matter requires investigation, the Referral Delegate should seek advice from the Directorate HR team. Further advice may be sought from the ACT Government Solicitor's (GSO) office and/or the PSU.

### Length of time that has elapsed

To ensure procedural fairness, consideration should be given to the length of time that has elapsed since the alleged misconduct occurred and the potential likelihood for capturing quality, untainted evidence. This should be weighed against the seriousness of the allegations in determining what action may be appropriate.

### Allegations about multiple employees

Where allegations are made about multiple ACTPS employees, the case against each employee should be assessed individually on the misconduct each employee is alleged to have committed. If matters with multiple respondents are referred for misconduct investigation, they should be treated separately and considered on the evidence relevant to each individual's actions.

### No longer an ACTPS employee

Where the person who is the subject of allegations of potential misconduct is no longer an employee of the ACTPS, and a misconduct process has not been commenced, there is no jurisdiction to pursue a misconduct process unless it relates to other legal obligations. To ensure compliance with our obligations to the ACT Ombudsman under the Reportable Conduct scheme, inquiries relating to allegations of Reportable Conduct by ACTPS employees must be conducted, even when the employee is no longer employed in the ACTPS.

The Commissioner has the authority to continue or pause a misconduct process where an employee resigns after a misconduct process has already commenced. See the section on Employee transfers / resigns in Part 9 of this document for further information relating to this.

## Behaviour outside the workplace

Section 9 of the *Public Sector Management Act 1994* identifies behavioural obligations, some of which are related to conduct **‘when acting in connection with the employee’s job’**, and some of which have no restrictions to when the conduct must or must not occur.

Misconduct is defined in the ACTPS Enterprise Agreements to include behaviour that **‘may bring or has brought the Directorate or the ACTPS into disrepute’**. There is no restriction on where or when this conduct occurs and may relate to behaviour that occurs outside of the workplace.

In summary, conduct or behaviour that occurs outside of the workplace may still amount to misconduct, particularly where:

- there is a clear connection between the employee’s out-of-hours conduct and their employment; and
- the conduct was incompatible with the employee’s duty as an employee or was likely to cause serious damage to the employment relationship.

## Admissions

The ACTPS Enterprise Agreements provide that if the employee fully admits to the alleged misconduct and agrees that an investigation is not required, then the Delegate can determine an appropriate sanction (**subclause H2.6**). The employee must agree that there is no need for an investigation and agree to make a written admission statement.

An admission requires the employee:

- understands the full details of what is being alleged;
- agrees the alleged behaviour occurred;
- accepts the behaviour constitutes misconduct; and
- understands the consequence of making such admissions (i.e. that a sanction may be imposed).

Any admissions made by the respondent must be voluntary and not arise from any threats made, real or perceived, or any inducement offered.

When deciding whether to forego a full investigation, the Delegate should consider whether the employee may be admitting to less than what has occurred to avoid a thorough investigation.

Whilst a full investigation may not be required, the employee is still subject to a misconduct process and the admission must be fully documented in an admission statement. This will ensure procedural fairness to the respondent and assist the Delegate in obtaining all the facts so that an informed decision can be made regarding an appropriate sanction. The PSU can assist with this process.

The Delegate still needs to determine that misconduct (as defined in the Enterprise Agreement) has occurred. When applying any sanction, the Delegate must consider the nature and full circumstances of the misconduct, any mitigating factors, the details of the employee’s prior service record and performance (**subclause H2.7**).

In order to provide accurate statistical data in relation to ACTPS misconduct processes, the outcome of any misconduct processes internally handled by the Directorate through admissions must be reported to the PSU.

## Underperformance versus misconduct

When assessing a workplace issue, it is important to consider whether the issues raised relate to an employee's performance rather than misconduct. Underperformance means a failure to perform the duties of the position or a failure to perform them to the required standard.

In the first instance, underperformance can be dealt with through the provision of advice and support, through a fair and transparent framework for action to improve the performance in accordance with **clause H4 (Underperformance)** of ACTPS Enterprise Agreements and the ACTPS Performance Framework ([www.cmd.act.gov.au/governance/public/performance](http://www.cmd.act.gov.au/governance/public/performance)).

Borderline situations potentially involving both misconduct and underperformance require the preliminary assessment to determine the best course of action to resolve the issue. Resolution via the underperformance processes is often the most effective course because it gives the employee a better opportunity to learn and to improve.

However, sometimes the particular circumstances of the case may warrant a misconduct process instead. Underperformance may constitute misconduct if:

- there is an additional degree of willfulness or intent;
- serious negligence is displayed by the employee; or
- the pattern of underperformance continues despite directions to the contrary.

If during an underperformance process or other performance improvement process (such as Counselling) the employee fails to comply with a reasonable direction, a misconduct process may be necessary. A misconduct process can operate concurrently with an underperformance process.

An underperformance process can reasonably result in evidence showing that there is a pattern of underperformance, despite short term periods of satisfactory performance. In the case of continued underperformance, manager/supervisors should seek assistance from the Directorate HR team.



## PART 6: REASSIGNMENT, TRANSFER OR SUSPENSION AND SUMMARY TERMINATION

### Reassignment, Transfer or Suspension

The decision to reassign, transfer or suspend the employee is at the discretion of the Referral Delegate who has determined that the matter should be investigated. This decision and reasoning should be documented.

The full provisions for reassignment, transfer and suspension are contained within the ACTPS Enterprise Agreements (**clause H8**). The Referral Delegate should consider whether it is in the public interest, or the interest of the ACTPS and/or the Directorate to reassign, transfer or suspend the employee.

In order to do this, the Delegate may give consideration to:

- any potential risk to the health and safety of employees and/or clients;
- any potential risk for the employee to interfere with the investigation;
- any risk that the misconduct may be continued or repeated;
- the effect on the employee's health, their position within the organisation and/or their professional standing; and
- the severity of the alleged misconduct.

Before making the decision to suspend, either with or without pay, the Referral Delegate should consider seeking advice from the ACT Government Solicitor's Office (GSO).

Reassigning the employee's duties or transferring the employee to other duties may assist the Directorate to maintain a cohesive and efficient workplace while the investigation is being conducted, while still allowing the employee to maintain an effective employment relationship with the Directorate.

The decision to reassign, transfer or suspend will usually be made at the same time as the decision to investigate. However, it may also occur at any time during the investigation process. In this instance, it will usually be linked to a further development in the investigation or new evidence being discovered.

An employee who is suspended must be available to attend work and participate in the misconduct process within 48 hours of notice being given (**subclause H8.7**).

Suspension without pay is usually only appropriate where serious misconduct is alleged or where the employee is charged with a criminal offence that would be incompatible with the continuation of the employee's employment (**subclause H8.8**). A period of suspension without pay must generally be reviewed every 30 calendar days (**subclause H8.9**).

### Summary termination

The head of service may summarily terminate the employment of an employee without notice for **serious misconduct**, as defined within the Fair Work Regulations (**subclause H7.7**).

Even where conduct is considered serious enough to justify summary termination, in most cases it is advisable to conduct a short investigation in order to gather relevant evidence. Such evidence can be placed on the employee's record and may later be required to assist in defending any subsequent claim brought by the employee against the Territory.

Where a decision is made to summarily terminate the employment of an employee, the Delegate should meet with the employee, inform them of their decision and the reasons for it. The employee should also be provided with a written letter of termination documenting this information and be given a brief opportunity to explain their alleged behaviour.

Summary termination is in normal circumstances a quick process reflecting the fact that the employment relationship has irretrievably broken down. Where the process to make an assessment of the best approach towards the matter might take longer, suspension with or without pay may be used while the decision is made.

Summary termination has an immediate effect. The Delegate should consider the following:

- the seriousness of the misconduct;
- the employee's response to the allegation(s);
- alternative options regarding sanction; and
- advice from the Directorate HR team and the GSO.

In order to provide accurate statistical data in relation to ACTPS misconduct processes, any misconduct processes internally handled by the Directorate through summary termination must be reported to the PSU.

## PART 7: CRIMINAL ALLEGATIONS OR CHARGES

### Allegations of behaviour at work that may be a criminal offence

Where allegations of inappropriate behaviour in the workplace may constitute a criminal offence, the Referral Delegate should ascertain whether a report has been made to police and, if not, determine whether a report should be made.

If a credible allegation is made against an employee that involves criminal conduct, advice should be sought from the Directorate HR team, who will liaise with the police or other investigating bodies, so as not to jeopardise or prejudice the criminal proceedings.

When an investigation is referred to the PSU and a report has been made to the police, the PSU will liaise with the police in relation to the timing of the misconduct investigation. The misconduct investigation will continue unless police request that it does not. However, the timeliness of an investigation may be affected if there are criminal proceedings in progress that relate to an employee's conduct in the workplace and/or to private actions outside of the workplace.

### Criminal charges outside of the workplace

ACTPS Enterprise Agreements provide that being convicted of a criminal offence may constitute misconduct and be grounds for a sanction where that conviction adversely affects the interests of the Directorate or the ACTPS (subclause H12.4). These provisions also permit the commencement of a misconduct process upon the employee being charged, including a right to suspend the employee (subclause H12.2), but any sanction would ordinarily be postponed pending the outcome of the criminal proceeding and a statement from the employee about those proceedings.

An employee must advise the head of service, in writing, of any criminal charge laid against them, in circumstances where the interests of the Directorate or the ACTPS may be adversely affected and needs to do so within 48 hours where practicable (but no later than within 7 calendar days).

Where a manager receives notice from an employee that they have had criminal charges laid against them, the manager should consider whether or not further action needs to be taken. This would depend on factors such as:

- the circumstances and seriousness of the alleged criminal offence;
- the employee's obligations under Section 9 of the PSM Act;
- the operation and management of the employee's work area;
- the integrity and good reputation of the ACTPS and the Directorate;
- the relevance of the offence to the employee's duties; and
- where reportable conduct is alleged, report the allegations to the ACT Ombudsman and conduct a Reportable Conduct investigation.

Where an employee fails to advise the head of service of a criminal charge, conviction or finding as required by ACTPS Enterprise Agreements, this may give rise to allegations of misconduct and result in an investigation and possible disciplinary action.

## PART 8: EXTERNAL REPORTING OBLIGATIONS

The same behaviour which gives rise to allegations of misconduct may trigger other reporting obligations. In other instances, it is the finding of misconduct which will need to be reported. It is generally the responsibility of the relevant Directorate to ensure that those obligations are met.

### Reportable conduct

On 1 July 2017, the Reportable Conduct Scheme commenced in the ACT. Under the scheme all ACTPS Directorates need to notify the ACT Ombudsman of allegations that an employee has engaged in conduct related to, or involving:

- ill treatment of a child;
- neglect of or psychological harm to a child;
- misconduct of a sexual nature involving a child; or
- a criminal offence involving a child.

The Reportable Conduct scheme in the ACT covers:

- all employees, contractors and volunteers who work for the ACT Public Service whether they work directly with children or not;
- alleged behaviour that happens outside of the workplace, as well as alleged behaviour within the workplace; and
- previous employees of the ACTPS, provided they were employees/volunteers at the time of the alleged behaviour.

When an allegation of behaviour that is consistent with the definition of Reportable Conduct is received by the head of a Designated Entity (the Director-General of ACTPS Directorates), the allegation must be:

- reported to the ACT Ombudsman's Office (via a 17G form);
- investigated by the Designated Entity; and
- finalised with a finding regarding the behaviour reported to the ACT Ombudsman's Office (via a 17J form).

If an employee resigns from the ACTPS while a Reportable Conduct inquiry is underway, the matter must still be finalised, which includes continuing the investigation relating to the allegations of Reportable Conduct to enable the Designated Entity to report findings to the ACT Ombudsman's Office, irrespective of whether a concurrent misconduct process continues or not.

Reportable Conduct Contact Officers have been appointed in each Directorate to assist with compliance with the scheme.

Further information relating to the Reportable Conduct Scheme can be located on the ACT Public Service Employment portal and the ACT Ombudsman Office website – [www.ombudsman.act.gov.au](http://www.ombudsman.act.gov.au).

### Restrictive Practices

The *Senior Practitioner Act 2018* (the Act), which came into effect on 1 September 2018, provides a formal framework for the reduction and elimination of restrictive practices by service providers in the ACT.

The Act enshrines the principle that providers should only use restrictive practices in very limited circumstances – as a last resort, in the least restrictive way and for the shortest period possible in the circumstances.

‘Providers’ are defined under the Act as persons or other entities who provide any of the following services to another person:

- education (including education and care);
- disability;
- care and protection of children;
- a service prescribed by regulation.

Under the Act, service providers must report all uses of a restrictive practice to the Senior Practitioner, whether there is a positive behaviour support plan in place for the person or not.

## Integrity Commission

The newly established ACT Integrity Commission will commence full operations in late 2019.

The ACT Integrity Commission is an independent body that has the power to investigate corruption in public administration and strengthen public confidence in government integrity. The Integrity Commission will play an important role in ensuring the transparency and accountability of the ACT Public Sector and ACT Legislative Assembly.

The Integrity Commission will investigate conduct that is alleged to be corrupt conduct in relation to all ACT Public Sector entities, their employees and contract staff in government directorates and territory-owned corporations, members of the Legislative Assembly and their staff. Its jurisdiction will also extend to those performing functions of a public nature.

The Integrity Commission will prioritise the investigation and exposure of serious corrupt conduct and systemic corrupt conduct. This does not limit the commission from considering any conduct that fall within the definition of corrupt conduct.

Any person may make a complaint to the commission about conduct that may be corrupt conduct.

Further, under the Integrity Commission Act 2018, heads of public sector entities and senior executives have certain obligations that must be met. This includes mandatory corruption notification responsibilities. That is, heads of public sector entities and senior executives must notify the Integrity Commission about any matter the person suspects on reasonable grounds involves serious conduct or systemic corrupt conduct.

## Regulatory bodies

There is a range of other regulatory bodies which are industry specific and that ensure compliance with registration and other requirements.

Examples of such regulatory bodies include, but are not limited to:

- Teacher Quality Institute (TQI);
- Australian Health Practitioner Regulation Agency (AHPRA);
- ACT Government (Electrician license, Working with Vulnerable People etc)

## PART 9: INVESTIGATION PROCESS

The purpose of an investigation is to examine and evaluate all relevant facts to enable the Misconduct Delegate to determine whether, on the balance of probabilities, the alleged behaviour occurred and whether that behaviour is consistent with the definition of misconduct.

### Referral

If the Referral Delegate determines that a matter warrants investigation, they should seek assistance from the Directorate HR team. ACTPS misconduct investigations are conducted or co-ordinated by the PSU.

The matter is referred to the Commissioner by completing a PSU Investigation Request form (available from <http://sharedservices/actgovt/HR-forms.htm>). The request form should be emailed to [ProfessionalStandardsUnit@act.gov.au](mailto:ProfessionalStandardsUnit@act.gov.au) and include:

- identification details of the parties involved;
- employment arrangements of the respondent, including the relevant Enterprise Agreement;
- the preliminary allegation(s) and background information;
- the scope of the investigation;
- information about known or possible sensitivities;
- relevant policies and/or procedures; and
- any other relevant information.

**Note:** The referral should not include any information relating to past discipline processes or previous sanctions.

The Commissioner will either appoint an appropriately trained person to conduct an investigation or may decide that an investigation will not resolve the matter and refer it back to the Directorate for alternative resolution or further consideration (*sub-clause H7.3*).

### Allegations

The allegations to be investigated will be determined by the Referral Delegate and will form the basis of the investigation.

At the time of the referral the allegations are preliminary and may be broad, however they should provide some detail as to the nature of the matters that are to be investigated, be current and significant. The preliminary allegations are intended to ensure the respondent is advised of the nature of the circumstances. Following the collection of evidence, the allegations may be further developed to be more specific. In any event, prior to the respondent having an opportunity to respond to the allegations, the Investigator will provide the respondent with the final particularised allegations which the matter will be assessed against.

If new allegations are identified through the investigation, they will be referred back to the Referral Delegate for assessment as to what further action is required. Equally, the Referral Delegate may choose to remove an allegation from the process if there is insufficient evidence to proceed. If the Misconduct Delegate is not the Referral Delegate, they will be advised of any change to the allegations.

## Appointment of an Investigator

The role of the Investigator is to undertake an investigation in accordance with established procedures, aimed at ensuring the process is completed promptly and thoroughly and that all employees are afforded procedural fairness.

Prior acts of misconduct by the employee under investigation will not usually be relevant to the investigation, but they may be relevant to a sanction decision if misconduct is found to have occurred. The Investigator should disregard any information concerning prior acts of misconduct that emerge during the investigation as this may prejudice the Investigator's view of the employee.

### Qualifications

As a minimum requirement, Investigators employed within the PSU hold a Certificate IV in Government Investigations (or its equivalent) or will obtain such qualifications within 6 months of appointment.

### External Investigators

An external investigator from a nominated panel of providers may be selected to conduct an investigation, where:

- specialised skill is required;
- the matter is of a complex nature;
- the respondent is an SES member;
- a conflict of interest (real or perceived) exists; or
- the PSU will not be able to complete the investigation in a timely fashion.

In cases where an external Investigator is required, the process will be facilitated and overseen by the PSU. A letter of engagement and Terms of Reference will be agreed upon with the Referral Delegate. The referring Directorate will be responsible for the payment of external investigative services.

## Notifying the respondent

The Referral Delegate will notify the respondent, in writing, of their decision to refer the allegations to the Commissioner for investigation. The letter should include:

- the outcome of the preliminary assessment;
- the details of the allegation(s) (these may be broad at this stage but all known information should be included), noting that these may be further refined during the investigation and the employee will be advised accordingly;
- an explanation of the misconduct process in the Enterprise Agreement;
- who will be conducting the investigation;
- details of the decision maker in the misconduct process (Misconduct Delegate) if known;
- the possible consequences of the process;
- whether the employee is to be reassigned, transferred or suspended (with or without pay), during the investigation;
- details of the EAP service;

- a direction not to discuss the matter with any Directorate employee, unless they are approved by the Referral Delegate; and
- any other relevant information or direction to the employee, including whether notifications have been made to external parties, such as the ACT Ombudsman, the police or a regulatory body.

The Directorate HR team can assist the Referral Delegate in drafting this letter. Further advice may be sought from the PSU and/or the GSO in the preparation of the letter and any accompanying documents.

If a respondent requests that all communication relating to a misconduct process is sent to them via a third person, including a union representative or legal representative, this will be complied with once written confirmation has been received. In such cases, all correspondence will be sent to the union representative or legal representative with a copy to the respondent, unless specifically instructed otherwise.

### Obligations of the respondent

All parties have an obligation to participate in misconduct processes in good faith.

Respondents must make themselves available to participate in the process, unless they are on approved leave. Annual leave during the period of the investigation should be approved in consultation with the Referral Delegate.

Prior to being given an opportunity to respond to the allegation(s), the Investigator will provide the respondent with full particulars of the final allegation(s) and any information relevant to the allegation they would reasonably need in order to respond to the allegation(s).

The respondent will be invited to attend an interview with the Investigator. The respondent must be advised in advance of the time scheduled for the interview and given an appropriate amount of time to prepare. If they wish, they can arrange for a support person or representative to be present. The respondent may choose not to answer some or all questions and/or provide information after the interview has taken place.

A respondent may opt to provide a written response rather than attending an interview or supplement the information provided at interview with further written information. The respondent may choose to provide no response at all.

While a respondent is obliged to cooperate and participate in the investigation in good faith, this does not mean that a failure or refusal to answer questions will amount to a finding of misconduct. If a respondent refuses to answer any or all questions, they should be advised that in the absence of any evidence provided by them, the Misconduct Delegate will make a determination based upon what other facts or evidence are at hand.

Respondents must abide by the direction, given to them by the Referral Delegate in the notice of investigation, to not discuss the allegations or the process with other Directorate employees (unless they have been approved by the Delegate). This is to maintain the integrity of the investigation and to ensure that evidence obtained from other staff is collected by an independent source. It also assists in maintaining harmony and limiting disruption in the workplace.



## Response to the allegations

It is usual practice that the respondent is interviewed after all other witnesses have been interviewed and all known evidence has been obtained.

As a matter of procedural fairness, the respondent is entitled to know of all significant and relevant material that is or may be adverse to their interest so they may properly respond.

The Investigator will write to the respondent and provide them with particulars of the final allegation(s). The letter will include:

- particulars of the final allegation(s), including any material or documents the respondent would reasonably need to fully respond to the allegation(s);
- options to provide a response;
- the option of bringing a support person or representative to an interview;
- the possible consequences of the misconduct process;
- details of the Employee Assistance Program; and
- a reminder of the direction, from the Referral Delegate, to not discuss the matter with any ACTPS employee (other than their support person/representative), unless they are approved by the Delegate.

The respondent will be given a reasonable opportunity to respond to the allegation(s). This can be done in writing and/or at an interview with the Investigator or in a different manner as agreed with the Investigator. Requests for extension to the time provided to respond will be done on a case by case basis and in consultation with the Referral Delegate.

### Interview

The respondent must be given at least 24 hours' notice of an interview. However, when determining what a reasonable period of notice is, consideration should be given to:

- the number of allegations,
- the complexity of issues,
- the amount of information provided to the respondent to consider; and
- the time required to arrange a support person or representative.

Respondent interviews will usually be electronically recorded. The interview process will be explained to the respondent before commencing. The respondent will be informed that they are not obliged to provide any information, however any information they do provide may be considered by the Misconduct Delegate in determining the matter.

All allegations notified to the respondent should be explored at the interview. Any admissions made by the respondent at interview must be voluntary and not as part of an inducement offered or threat, real or perceived.

Following the interview, a copy of the recording and a transcript of the interview will be provided to the respondent. There is no requirement for the transcript of the interview to be signed by the respondent. The Investigator will validate the accuracy of the transcript. However, any corrections or further information provided by the respondent will be included in the Investigation Report, if relevant, and attached for the Misconduct Delegate's consideration.

If a statement is prepared for the respondent, they will be given an opportunity to review a draft prior to signing the document. If the respondent declines to sign or evades signing their statement, the information can still be used. However, the Investigation Report should reflect that the respondent

declined to sign the document so that the Misconduct Delegate can determine what weight will be attributed to the information.

### **Written response**

The respondent may provide a written response of their own in relation to the allegations. This may be in addition to attending an interview or as an alternative. The Investigator may seek further clarification from the respondent in relation to the written response provided if necessary.

### **No response**

A respondent is entitled to provide no response to the allegation(s) if they so choose. A decision to provide no response does not amount to a finding of misconduct.

Where a respondent chooses not to respond to the allegation(s) or difficulty is experienced in engaging a respondent to provide a response, the Investigator will write to the respondent reiterating the options to provide a response, either by interview or in writing, by a certain date. The respondent will be advised that if they fail to respond by the specified date, the matter will be finalised, and the Misconduct Delegate will consider the matter on the information available without the respondent's input.

## **Role of a Support Person and a Representative**

### **Support person**

A support person is considered to be a person who provides emotional and moral support to the respondent during proceedings. A support person can be a colleague, a friend, family member, union representative or legal representative. A support person must not be, or likely to be, a witness or party to the proceedings.

The support person may take notes during the interview. They may also request a short break for the employee during the interview. The employee can use this time to seek further advice or information from the support person or regain their composure if required.

The support person must, at all times, remain respectful of the process and not act in a manner that is disruptive or counterproductive. If the Investigator believes the support person is being disruptive or counter-productive, they should suspend the interview. If the matter cannot be resolved another interview should be re-scheduled and a new support person sought by the respondent.

### **Representative (including union officials)**

A representative may also accompany the employee to an interview and take a more interventionist role. In these circumstances the representative does so under the powers given to them by the *Fair Work Act 2009* and by the ACTPS Enterprise Agreements by which they exercise their right of representation.

While a representative can, where appropriate, advocate on behalf of a respondent (object to certain questions, provide support, clarify matters), all parties must meet their obligation to participate in the investigative process in good faith, as set out in the ACTPS Enterprise Agreements.

The primary purpose of the interview is an opportunity for the respondent to respond to questions of fact (if they so choose). The best person to provide that information is the respondent (and not the support person/representative).

If a respondent chooses not to answer questions, or to have an advocate answer questions on their behalf, this is their right. In considering the matter, the Misconduct Delegate should give appropriate weighting to the evidence from this process.

## Medical incapacity of respondent

If the respondent is unable to attend an interview or provide a response to the allegation(s) due to medical illness, the Referral Delegate should review the circumstances and may request further, more specific, information from the employee or their treating practitioner (with the agreement of the respondent) as to the reasons the employee cannot respond.

Being unfit for work does not necessarily mean that the respondent cannot attend an interview to respond to the allegations or provide a written response to the allegations. Where appropriate, the Referral Delegate may seek an independent medical assessment of the respondent's fitness to attend an interview or provide a response to the allegations.

The Investigator, in consultation with the Directorate HR team, will keep in contact with the respondent to manage communication and expectations about the investigative process.

If all avenues have been exhausted to receive a response to the allegations by the respondent, the matter may be finalised noting that the respondent has not provided a response and the reasons for that. The Misconduct Delegate should consider this when making their determination. The respondent will receive a further opportunity to provide information when they are notified of the proposed finding.

## Maintaining confidentiality

Managers, Investigators and Delegates must endeavour to maintain confidentiality throughout the complaint management process and investigation, including informing all parties of their obligation to keep details of the investigation confidential. Maintaining confidentiality:

- minimises the risk of harm to the parties of a complaint/allegation;
- reduces the opportunities for evidence to become contaminated; and
- minimises rumours being spread throughout the workplace.

However, maintaining confidentiality is different from ensuring anonymity in the process. It is unreasonable to expect a respondent to provide a response to allegations or information that is not detailed and thorough. Respondents will be informed of the case against them, which may include information from witness statements, to assist in their response. Witnesses should be advised of this before they provide any evidence. Unless there is a specific reason, (such as the witness being a young or vulnerable person) witness names will not normally be redacted from Investigation Reports.

Respondents can communicate information about the investigative process to their representative or support person, provided they are not a witness or party to the investigation. The support person/representative is also required to maintain confidentiality.

## Employee transfers / resigns

### **Respondent transfers during a misconduct process**

If the respondent transfers to another Directorate and/or Enterprise Agreement, either permanently or temporarily, the misconduct process will continue, and the employee is still required to participate (*subclause H1.5*).

Any disciplinary action which is determined will be applied to the employee in their new position. The Sanction Delegate must be satisfied that it is appropriate and necessary and have regard to the nature of the misconduct and the changes in employment circumstances, including any material bearing on the employee's duties and responsibilities in their new position (*subclause H1.5.1*).

The misconduct process will be completed under the Enterprise Agreement under which it was commenced. The advice of HR and the GSO should be sought in these circumstances.

Where a Machinery of Government (MOG) process occurs and the respondent's position transfers to another Directorate, the misconduct process will transfer to the gaining Directorate.

### **Respondent resigns during a misconduct process**

If the respondent resigns from their employment with the ACTPS during a misconduct process, having regard to the seriousness of the matters being investigated, the Commissioner may decide to cease the misconduct process.

However, where satisfied there is a need, the Commissioner may determine to:

- complete the misconduct process, including inviting the employee to participate in the process. The outcome of the process can be taken into account with any application by the employee to re-enter the ACTPS; or
- pause the process upon the resignation and inform the employee that the misconduct process may recommence if the employee re-enters or seeks to re-enter the ACTPS. Any discipline action and sanction determined as a result of a resumed misconduct process may be imposed on the employee in their new position or be taken into account with any application by the employee to re-enter the ACTPS.

#### ***(subclause H1.6)***

If the allegations are of a criminal nature, the matter should still be reported to police. Where the allegations are Reportable Conduct, enquiries will continue to ensure the Directorate's obligations to the ACT Ombudsman under the Reportable Conduct scheme are met.

### **Other parties to the misconduct process resign during the process**

Complaints about ACTPS staff can be made by any person, including current staff, ex-staff, clients or members of the public. Consequently, whether a person who makes a complaint or a witness is currently employed with the ACTPS or not is irrelevant. All reasonable efforts will be made by the Investigator to seek out parties involved in the incidents to provide evidence to the process.

Participation in the process and the provision of information by parties is voluntary.

## PART 10: INVESTIGATION FINDINGS

### Standard of proof

In an administrative workplace investigation, the standard of proof required is **'on the balance of probabilities'**. This means that it has to be determined whether it is more probable than not that the alleged behaviour occurred.

Investigators must ensure they obtain sufficient evidence and facts in order to make a finding of fact on the balance of probabilities. Investigators should only take into account relevant information, and any conclusions reached should be logically formulated. To this end, Investigators need to ensure that the employee and all key witnesses provide all relevant information. The decision to follow up witnesses or consider additional material put forward by a respondent is to be made by the Investigator in the context of the requirement to ascertain, as far as possible, the truth of the allegations.

### Investigation Report

At the conclusion of an investigation, a report will be provided to the Misconduct Delegate. The report will include all relevant information, which may include:

- background;
- investigative process;
- summary of evidence (such as statements, documentary evidence, respondent's response);
- policy / legislation;
- analysis;
- conclusion;
- matters for consideration; and
- attachments.

The Investigation Report does not make recommendations about disciplinary action or sanction, nor is it to contain observations on issues not germane to the purpose of the report (e.g. comments on system improvements or the behaviour of other staff members).

The Investigator does not determine whether misconduct has occurred. If the Investigator concludes that there is sufficient evidence to support the allegation, they may include information relating to whether the alleged behaviour fits with the definition of misconduct for the Delegate's consideration.

The Misconduct Delegate should:

- review the report, along with the accompanying evidence, to determine on the balance of probabilities whether misconduct has occurred;
- if misconduct is found, determine an appropriate sanction in accordance with the relevant ACTPS Enterprise Agreement; and
- notify the respondent of the outcome.

All attachments to the report should be provided with the report and considered by the Delegate in conjunction with the report.

The investigation is not deemed to be completed until the Misconduct Delegate is satisfied that all relevant enquiries have been made and the information has been included in the report. If the Misconduct Delegate requires additional information in order to make a decision, they may ask for clarification or further enquiries to be made by the Investigator. Any additional information requested will be added to the Investigation Report prior to a decision being made.

No person, including the Misconduct Delegate, can have a report altered in order to manufacture a pre-determined or desired outcome. The report is a product of an independent process that is designed to present a balanced view of the evidence, ensuring fairness to the parties involved in the process.

## Finding of misconduct

It is the Misconduct Delegate's responsibility to consider the evidence with a view to determining whether misconduct has occurred or not. Whilst the Investigator may provide a conclusion about whether the allegation(s) can be supported by the evidence or not, they are not decision-makers in the process. All the evidence should be considered by the Misconduct Delegate to ascertain whether:

- there is sufficient evidence to support that the alleged behaviour occurred; and
- the alleged behaviour is consistent with the relevant definition of misconduct.

Misconduct Delegates, whilst acting under the authority of the Commissioner, make decisions in their own right not on the behalf of the Commissioner. They must carefully consider the Investigation Report and ensure that they are satisfied with the procedures and findings before relying on it to inform their decision. A decision-maker is obliged to ensure they understand the relevant rules, framework and processes associated with assessing allegations/complaints and investigative methodology, before making decisions to ensure they understand what is required of them and why.

The Misconduct Delegate should document their finding in relation to each allegation and the reasons for their decision. A decision form to record the Misconduct Delegate's finding will accompany the Investigation Report.

The Misconduct Delegate may choose not to agree with the finding of fact contained in the Investigation Report. In these circumstances, the Misconduct Delegate should include in their documentation clear reasons as to why, based on their assessment of the evidence, they do not agree with the report.

### **Proposed finding**

The proposed finding is the Misconduct Delegate's initial determination as to whether they believe misconduct has occurred or not. This is an interim decision and, if an adverse finding is proposed, the respondent has the opportunity to respond before it is finalised.

If the Misconduct Delegate determines that **misconduct has not occurred**, they will notify the respondent of their finding in writing and advise that no sanctions will be imposed.

If the Misconduct Delegate determines that **misconduct has occurred**, they will advise the respondent in writing of the proposed finding, reasons for the decision and the period the respondent has to respond to the proposed finding (noting that this must be reasonable in the circumstances and no less than 14 calendar days).

A copy of the Investigation Report should be provided to the respondent. However, if there are compelling reasons not to provide the Investigation Report, a redacted version of the report or a detailed summary of the report and relevant evidence should be provided to the respondent. The underlying principle is that the material provided captures the substance of the investigation report sufficiently.

## **Final outcome**

Following consideration of any response from the respondent or after the time period in which they had to respond has lapsed, the Misconduct Delegate will make a final determination as to whether misconduct has occurred or not.

The respondent will be advised in writing by the Misconduct Delegate of the final misconduct decision. Where misconduct has been found to have occurred, the Misconduct Delegate will also notify the respondent of the proposed sanction or action to be taken (where the Misconduct Delegate and Sanction Delegate are the same person) or that the matter has been referred to another Sanction Delegate for their consideration (see Part 11: Disciplinary Action).

The Sanction Delegate may be the Misconduct Delegate, the original Referral Delegate or another authorised delegate.

## **Reasons for a decision**

Providing reasons for a decision is one of the basic principles of procedural fairness and a fundamental aspect of the administrative workplace investigation. There is an obligation to provide reasons for a decision, particularly where a person may be adversely affected by an administrative decision.

Decisions made by the Misconduct Delegate may be reviewed by way of appeal or external review. Providing a statement of reasons supports diligent decision making and enables a delegate to explain and defend their decision if necessary. For the individual in receipt of the decision, it provides an opportunity to have the decision properly explained and helps determine whether they wish to seek a review or appeal and on what grounds.

The language used and the length of the statement will depend on the audience and the nature, importance and complexity of the issues at hand. However, the statement should include at a minimum:

- a decision as to whether the employee has engaged in misconduct and the nature of that misconduct;
- the reasons for the decision;
- a statement about the evidence relied on; and
- whether, in relation to the facts, the evidence was accepted or rejected – where the evidence is conflicting, reference should be made to the available evidence and why certain evidence is preferred or given more weight.

The statement of reasons must go further than to simply state conclusions; the actual reasons for those conclusions must be clear. This may include reference to relevant Directorate or ACTPS policies, guidelines or practices that have been taken into account.

The Directorate HR team can assist the Misconduct Delegate in drafting correspondence to the respondent. Further advice may be sought from the PSU and/or the GSO in the preparation of these documents if required.

# PART 11: DISCIPLINARY ACTION

## Disciplinary action

Consistency across the ACTPS in decision-making, as it relates to investigations and the rights afforded to employees, is important. In all cases the circumstances of the employee and the nature and requirements of their working environment needs to be considered, together with the other factors outlined in the Enterprise Agreements, when determining an appropriate sanction.

Following a finding that misconduct has occurred or where an admission of misconduct is made, the Sanction Delegate needs to consider whether disciplinary action is appropriate or whether a restorative approach might be more effective at correcting behaviour. Not every finding of misconduct will justify a sanction. If the employee's response to the investigation satisfies the Sanction Delegate that a repetition of the behaviour is unlikely, the Sanction Delegate may determine that a non-disciplinary option (i.e. mediation, counselling, remedial assistance) is more appropriate.

### Proposed sanction

The proposed sanction is the Sanction Delegate's determination as to what they believe is the most appropriate sanction in the circumstances. This is an interim decision and the respondent has the opportunity to respond before it is finalised.

The Sanction Delegate should document their decision in relation to the proposed sanction and the reasons for their decision. A decision form to record the sanction decisions will accompany the Investigation Report.

Within 14 calendar days of receiving a determination of a finding of misconduct from the Misconduct Delegate, the Sanction Delegate must advise the respondent of any proposed sanction. The time period in which the Sanction Delegate must make this decision can only be extended where extenuating circumstances exist. The respondent must also be advised of the timeframe in which they have to respond to the proposed sanction. This timeframe must be reasonable in the circumstances and not less than 7 days (**subclause H11.6**).

If the Sanction Delegate is the same person as the Misconduct Delegate, this can be done in the letter that informs the respondent of the final outcome of the investigation, i.e. that misconduct has occurred.

### Final sanction

After considering any response provided by the respondent or where the time period for response has lapsed, the Sanction Delegate should make their final decision in relation to the appropriate disciplinary action in the matter (**subclause H11.8**). They must decide whether any information provided warrants a reconsideration of the proposed sanction before making a final decision about sanction.

The Sanction Delegate should document their decision in relation to the final sanction and the reasons for their decision.

The Sanction Delegate must inform the respondent, in writing, of their final decision regarding disciplinary action, the dates relating to the effect or cessation of the sanction, and the appeal mechanisms available in the Enterprise Agreements (**subclause H11.8**).

The Directorate HR team can assist the Sanction Delegate in drafting these letters. Further advice may be sought from the PSU and/or the GSO in the preparation of these documents if required.



## What types of sanctions are there?

One or more of the following sanctions may be applied in relation to the employee (**subclause H11.1**):

- a written reprimand;
- a financial penalty which can:
  - reduce the employee's incremental level;
  - defer the employee's incremental advancement;
  - impose a fine on the employee;
  - full or partial reimbursement for damage wilfully incurred to property or equipment;
- transfer the employee temporarily or permanently to another position at level; ;
- remove any benefit derived through an existing Attraction and Retention Incentive;
- transfer the employee temporarily or permanently to a lower classification level;
- termination of employment.

Sanctions must be relative to the seriousness of misconduct concerned, weighing up proportionality and context. In determining the appropriate sanction, the following factors must be considered (**subclause H11.4**):

- the nature and seriousness of the misconduct;
- the degree of relevance to the employee's duties or to the reputation of the Directorate or the ACTPS;
- the circumstances of the misconduct;
- any mitigating factors, including any full admissions of guilt; and
- the previous employment history and the general conduct of the employee.

If the Sanction Delegate is independent to the work area, they may need to make further enquiries with the relevant work area or the Referral Delegate to fulfil the requirements of the Enterprise Agreement.

## Reasons for a decision

Providing reasons for a decision is one of the basic principles of procedural fairness and a fundamental aspect of the administrative workplace investigation. There is an obligation to provide reasons for a decision, particularly where a person may be adversely affected by an administrative decision.

Decisions made by the Sanction Delegate may be reviewed by way of appeal or external review. Providing a statement of reasons enables a delegate to explain and defend their decision if necessary, and supports diligent decision making. For the individual in receipt of the decision, it provides an opportunity to have the decision properly explained and helps determine whether they wish to seek a review or appeal and on what grounds.

## Finalisation of the process

Assistance from the Directorate HR team should be sought to ensure the Referral Delegate (if different) is informed of the outcome and the final sanction is implemented.

Information regarding the outcome of misconduct processes, including the finding and any final sanction imposed, must be provided to the PSU. This information will also be used by the Commissioner to provide statistical data, systemic issues and trend analysis to the Directorates.

## Complainant

If applicable, the Referral Delegate should write to the complainant in the matter to inform them that the matter has been finalised.

The misconduct process relates to an employment issue with another employee (i.e. the respondent), therefore the complainant is not able to be provided with specific information about the outcome of the matter or any disciplinary action taken, as such information is personal to the respondent. An exception to this would be if the respondent consented, in writing, to this information being provided to the complainant.

## Part 12: PROCESS FOR SES MEMBERS

When an allegation of possible misconduct by an SES member is being considered, it is the version of the legislation that was in place at the date of the SES member's contract which is relevant, both in terms of process and the standard against which the behaviour must be measured.

Amendments were made to the *Public Sector Management Act 1994* and the *Public Sector Management Standards* on 1 September 2016, which relate to the employment conditions of executive or SES staff. The conditions in the two versions of the Public Sector Management Standards differ slightly, in particular in relation to the definition of misconduct and the disciplinary action that can be taken, so it is important to ensure that the correct legislation is applied.

The principles of natural justice and procedural fairness must be followed when taking any action against an employee.

The procedure set out in the Workplace Behaviours section of the ACTPS Enterprise Agreements is consistent with the principles of natural justice and procedural fairness and is therefore considered to be the agreed procedure to be used when investigating allegations of misconduct relating to SES members. Investigations of SES members will be conducted in accordance with the Enterprise Agreement provisions and this document.

### Contracts commencing prior to 1 September 2016

The power to investigate an allegation of misconduct regarding an SES member (referred to in the relevant legislation as an *'executive employee'*), whose contract commenced prior to the amendments to the Act, is Section 636 of the *Public Sector Management Standards 2006*.

#### **Misconduct**

The definition of misconduct relevant to an SES member, includes:

- (a) conduct that harms, or is likely to harm, the reputation of the service of the Territory; and
- (b) a breach of the Act, section 9.

**(Section 636C (6), *Public Sector Management Standards 2006*)**

It should be noted that the relevant Section 9 of the *Public Sector Management Act 1994* for an SES member on this type of contract is the pre-amended version (i.e. general obligations of public employees).

#### **Suspension**

The SES member may be:

- (a) suspended from work without pay;
- (b) suspended from work with pay;
- (c) transferred to other duties.

The employee must be notified in writing of the suspension and the letter must include:

- (a) the day on which the suspension starts; and
- (b) the reason for the suspension; and
- (c) the day on which the suspension ends.

**(Section 636C (2), *Public Sector Management Standards 2006*)**

### **Disciplinary action**

If, after investigating the allegation, the delegate is satisfied on reasonable grounds that the SES member has engaged in misconduct they may impose one or more of the following disciplinary actions:

- (a) counsel the employee;
- (b) give the employee a written warning;
- (c) transfer the employee to other duties;
- (d) deduct a monetary penalty from the employee's salary;
- (e) terminate the employee's employment (Section 636F, *Public Sector Management Standards 2006*).

**(Section 636C (3), *Public Sector Management Standards 2006*)**

The Sanction Delegate needs to consider whether disciplinary action is appropriate or whether a restorative approach might be more effective at correcting behaviour. Not every finding of misconduct will justify a sanction. If the SES member's response to the investigation satisfies the Sanction Delegate that a repetition of the behaviour is unlikely, the Sanction Delegate may determine that a non-disciplinary option (i.e. mediation, counselling, remedial assistance) is more appropriate.

### **Serious misconduct**

An SES member can have their employment terminated, without notice, if the delegate is satisfied, on reasonable grounds, that the employee has engaged in serious misconduct.

**(Section 636F (3), *Public Sector Management Standards 2006*)**

## **Contracts commencing after 1 September 2016**

The power to investigate an allegation of misconduct regarding an SES member, whose contract commenced after the amendments to the Act, is Section 47 of the *Public Sector Management Standards 2016*.

### **Misconduct**

Misconduct is explained in Section 47 of the *Public Sector Management Standards 2016* as being misconduct under the Act. The *Public Sector Management Act 1994* defines that:

Misconduct, by a public servant, means failure to comply with section 9 (Public sector conduct).

### **Suspension**

If the delegate is satisfied that it is in the interests of the Service, they may take one of the following actions in relation to the SES member, until the end of the investigation –

- (a) suspend the SES member; or
- (b) change the SES member's SETs (statutory employment terms).

**(Section 47(3), *Public Sector Management Standards 2016*)**

At any time, if satisfied it is reasonable to do so, the delegate may:

- (a) change the suspension –
  - (i) for a suspension with pay – to suspension without pay; or

- (ii) for a suspension without pay – to suspension with pay; and
- (b) change the day on which the suspension ends.

**(Section 47(4), *Public Sector Management Standards 2016*)**

### **Disciplinary action**

If, following a misconduct process, the delegate is satisfied on reasonable grounds that the SES member has engaged in misconduct, they may impose one or more of the following disciplinary actions:

- (a) counsel the SES member;
- (b) give the SES member a warning;
- (c) place a condition on the SES member's continuing engagement;
- (d) deduct an amount from the SES member's salary;
- (e) change the SES member's contract;
- (f) end the SES member's engagement.

**(Section 48(2), *Public Sector Management Standards 2016*)**

The Sanction Delegate needs to consider whether disciplinary action is appropriate or whether a restorative approach might be more effective at correcting behaviour. Not every finding of misconduct will justify a sanction. If the SES member's response to the investigation satisfies the Sanction Delegate that a repetition of the behaviour is unlikely, the Sanction Delegate may determine that a non-disciplinary option (i.e. mediation, counselling, remedial assistance) is more appropriate.

### **Serious misconduct**

The delegate may end the SES member's engagement with no minimum notice period if satisfied on reasonable grounds that the SES member has engaged in serious misconduct.

**(Section 70(2)(a), *Public Sector Management Standards 2016*)**