

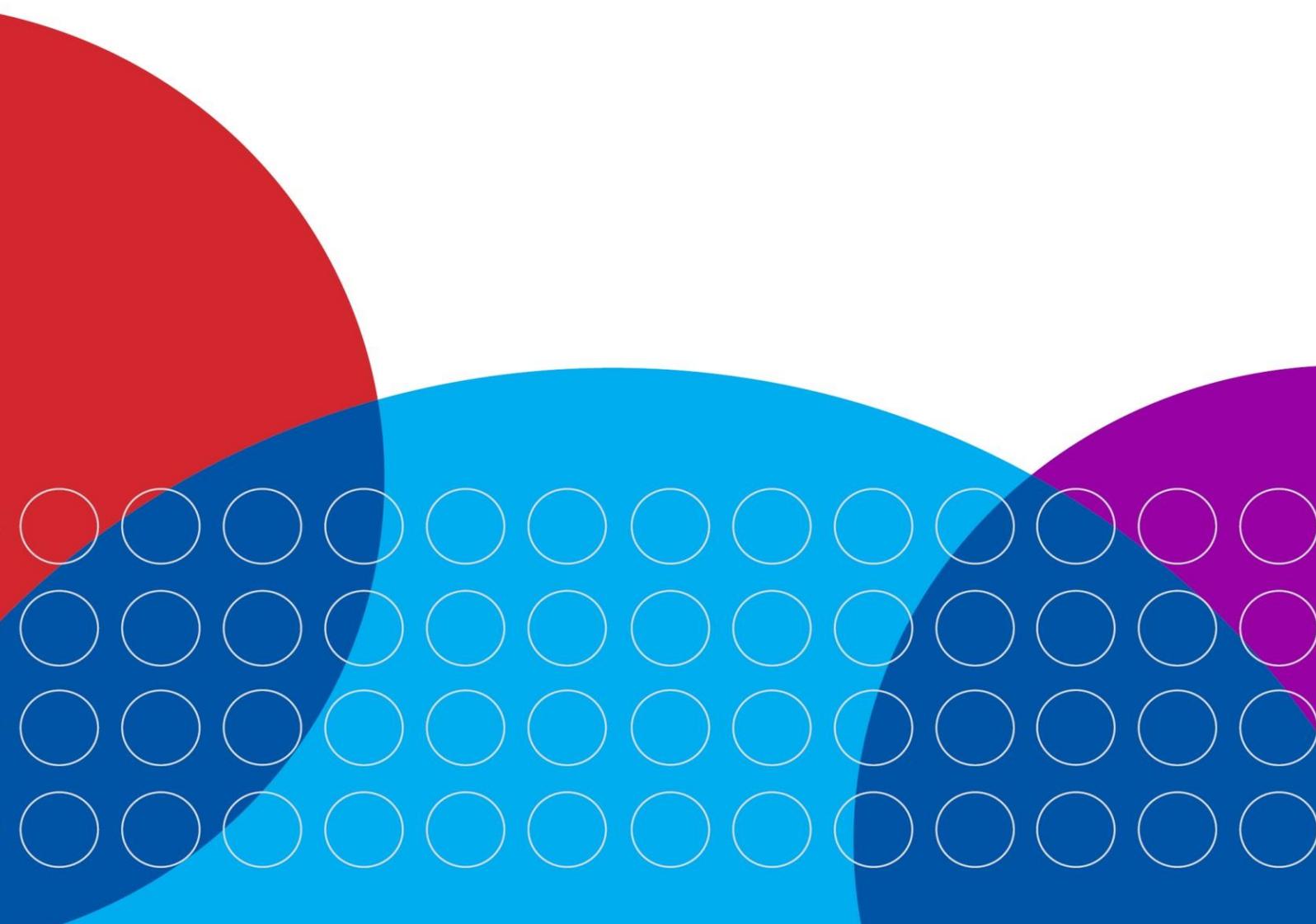


Government  
of South Australia

Office of the Commissioner  
for Public Sector Employment

# GUIDELINE OF THE COMMISSIONER FOR PUBLIC SECTOR EMPLOYMENT

## Management of Unsatisfactory Performance, Including Misconduct



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### Who is covered by this Guideline?

The Commissioner for Public Sector Employment is empowered under section 14(d) of the *Public Sector Act 2009* (“PS Act”) to issue guidelines relating to public sector employment. This Guideline has particular application to employment under Part 7 of the PS Act but contains material relevant to all employment in the South Australian public sector. Additional information is provided in section 1. Introduction.

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# 1 INTRODUCTION

The effective management of employee performance and conduct is essential to ensuring that the South Australian public sector and its agencies meet community expectations, and deliver services effectively and efficiently.

This Guideline is intended to assist human resources practitioners, decision makers and other managers in public sector agencies to manage the suspected, alleged and proven employee unsatisfactory performance, including misconduct.

The effective and efficient management of employee unsatisfactory performance, including misconduct requires the commitment of sufficient resources.

Whilst the contents of this Guideline concentrate on employment pursuant to Part 7 of the PS Act, certain content is relevant to employment across the South Australian public sector, including that relating to procedural fairness. The fundamental message the Guideline seeks to convey is that each matter at least to some degree turns on its individual facts and circumstances.

The Guideline is not a substitute for specialist human resource management, industrial/employee relations or legal advice.

This Guideline is published with the following objects of the PS Act in mind:

- to encourage public sector agencies and employees to apply a public sector-wide perspective in the performance of their functions;
- to make performance management and development a priority in the public sector;
- to ensure accountability in the public sector; and
- to provide the framework for the State's Public Service and the effective and fair employment and management of Public Service and other public sector employees.

The following public sector principles in the PS Act have also informed the content of this Guideline:

## **5 – Public sector principles**

### **(6) Ethical behaviour and professional integrity**

*Public sector employees are to—*

- *be honest;*
- *promptly report and deal with improper conduct;*
- *avoid conflicts of interest, nepotism and patronage;*
- *treat the public and public sector employees with respect and courtesy;*
- *make decisions and provide advice fairly and without bias, caprice, favouritism or self-interest;*
- *deal with agency information in accordance with law and agency requirements;*
- *avoid conduct that will reflect adversely on the public sector;*
- *accept responsibility for decisions and actions; and*
- *submit to appropriate scrutiny.*

Where agencies have policies in place relating to management of unsatisfactory performance or misconduct, relevant content of those policies should be consistent with this Guideline.

## 1.1 PUBLIC SECTOR AND PUBLIC SERVICE

For the purposes of this Guideline, an important question to consider “is the employee a Public Servant or is their employment otherwise covered by Part 7 of the PS Act?”

The decision maker and officers assisting them must be aware of the fundamental employment status of the employee; i.e. whether their employment is covered by Part 7 of the PS Act; or if some other specific legislation imposing a similar scheme to Part 7 of the PS Act applies; or if the employment is fundamentally governed by common law principles.



*All Public Service agencies and employees are part of the public sector but not all public sector employees and agencies are part of the Public Service.*

The term ‘public sector’ is defined in the PS Act as:

- **public sector** means the administrative units of the Public Service and all other public sector agencies and public sector employees;

‘Public sector employee’ is defined as:

- **public sector employee** means a chief executive of an administrative unit or an employee in an administrative unit or other employee of a public sector agency;

In summary, Part 7 of the PS Act is applicable to:

- Public Service employees, that is employees employed in an administrative unit and whose employment is not otherwise excluded under section 25(2) of the PS Act;
- certain employees in non-Public Service agencies due to the terms of transfer instruments; and/or
- employees in public sector agencies outside the Public Service to the extent provided for by another Act (i.e. the *Courts Administration Act 1993*) or the regulations under the PS Act. Regulation 13 of the *Public Sector Regulations 2010* applies Part 7 of the PS Act to a range of other non-Public Service-employment, including any amendments as established by the relevant Regulation.

## 1.2 WHAT IS MISCONDUCT (AS A FORM OF UNSATISFACTORY PERFORMANCE)?

The term ‘misconduct’ is defined in the PS Act as:

**misconduct** means—

- (a) a breach of a disciplinary provision of the public sector code of conduct while in

*employment as a public sector employee<sup>1</sup>; or*

*(b) other misconduct while in employment as a public sector employee<sup>2</sup>*

*the term includes making a false statement in connection with an application for engagement as a public sector employee and being convicted, while in employment as a public sector employee, of an offence punishable by imprisonment.*

Therefore conduct that constitutes employee misconduct is that which has been found as proven on the balance of probabilities, following a process affording an employee procedural and substantive fairness, to be:

- conduct that contravenes one or more of the provisions in the Professional Conduct Standards of the Code of Ethics for the South Australian public sector; and/or
- conduct that is misconduct at common law, such as a breach by an employee of one of the duties on employees at common law such as the duty of obedience and cooperation (i.e. failure to comply with a lawful and reasonable direction); and/or
- pre-employment conduct in the form of the provision of a false (including misleading) information in connection with an application for engagement as a public sector employee; and/or
- a public sector employee being convicted whilst in public sector employment of a criminal offence punishable by imprisonment.

Employee misconduct can consist of out of hours conduct, where there is a connection between the conduct and an employee's employment in the South Australian public sector and/or their status as a public sector employee.

### **1.3 WHAT IS UNSATISFACTORY PERFORMANCE?**

Other than conduct constituting misconduct, the term 'unsatisfactory performance' is to be interpreted broadly as referring to the inadequate performance by an employee of the duties of their role and includes consideration of the adequacy of their behaviour/conduct.

Misconduct is a form of unsatisfactory employee performance that is managed in a particular way. Some employee conduct may be legitimately characterised as unsatisfactory performance *per se* or unsatisfactory performance in the nature of misconduct.

Applying the overarching, fundamental principle that each matter is to be managed according to its individual facts and circumstances, a good example is conduct by an employee involving unsatisfactory attendance (i.e. consistent lateness for work or returning from breaks). Logically, managers would in most circumstances at least initially seek to address such conduct as unsatisfactory performance, by informal and, if necessary, formal performance management measures. However, it may become appropriate in given circumstances to address the conduct as misconduct where, for example, an employee contravenes a lawful and reasonable managerial direction.

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<sup>1</sup> This means contravention of the Professional Conduct Standards in the Code of Ethics for the South Australian Public Sector.

<sup>2</sup> This means misconduct at common law.

It is important to emphasise that it is not necessary for an employee to intentionally perform unsatisfactorily. There are many examples where the cause of/reason(s) for unsatisfactory performance is out of the employee's control (i.e. illness or disability). The important consideration from a managerial perspective is to identify when employee performance (including behaviour/conduct) is unsatisfactory and acknowledge there is an obligation upon management to address it appropriately.

To assist in evaluating and developing the performance of all public sector employees, public sector agencies are required to have effective performance management and development systems in place in accordance with section 8 of the PS Act and the *Direction of the Premier: Performance Management and Development*. Further guidance on the design and implementation of effective performance management and development systems is available in the *Guideline of the Commissioner for Public Sector Employment: Performance Management and Development*.

## **2 FUNDAMENTAL PRINCIPLES RELATING TO THE MANAGEMENT OF UNSATISFACTORY PERFORMANCE, INCLUDING MISCONDUCT**

The principles summarised in this Guideline are informed by a variety of sources, including legislation, legal principles, awards, other industrial instruments and decisions of tribunals and courts.

Certain principles summarised in this Guideline apply to all public sector employment and others relate only to Public Service employment or other public sector employment to which Part 7 of the PS Act applies. Further, this Guideline takes into account the fact that certain cohorts of public sector employees (other than those governed by Part 7 of the PS Act) are governed to varying degrees by specific legislation.

When managing unsatisfactory performance, including misconduct, decision makers and those assisting them must determine the fundamental employment status of the relevant employee; i.e. whether the provisions in Part 7 of the PS Act are applicable to the employment of the employee (or if some other specific legislation imposing a similar scheme to that of Part 7 of the PS Act applies) or if the employment is fundamentally governed by common law principles.

It is important to note that there is no 'one size fits all' way to manage unsatisfactory performance, including misconduct.

### **2.1 PROCEDURAL FAIRNESS**

The rules of procedural fairness, also referred to as natural justice, apply whenever the rights, interests, property or legitimate expectations of an individual are affected by an administrative (management) decision, this includes decisions relating to the management of unsatisfactory performance or suspected misconduct.

The three basic rules decision makers must adhere to are the hearing rule; the rule against bias and the no evidence rule.

### 2.1.1 The hearing rule

The hearing rule<sup>3</sup> demands that a person whose rights, interests or legitimate expectations may be adversely affected by an administrative decision has a right:

- to an opportunity to be heard before an intended decision is made;
- to receive all relevant information before a response or submission is provided by them or on their behalf;
- to have a reasonable opportunity to provide a response or submission; and
- for any response or submission provided by them or on their behalf to be objectively considered by the decision maker before any relevant decision is made and affected.

Using alleged misconduct as an example, this in part means that an employee who is alleged to have committed misconduct must be provided with:

- detailed and particularised allegations and copies of or access<sup>4</sup> to information relied upon in making the allegations<sup>5</sup>; and
- afforded a reasonable opportunity to respond to the allegations.

It also means that where a decision maker has found on the balance of probabilities that allegations of misconduct against an employee are proven and where as a consequence they intend to impose a disciplinary sanction(s)/take disciplinary action and/or to take some other action adverse to the employee (i.e. transfer to another role or workplace):

- the decision maker must advise the employee of their findings of fact and put the employee on notice of the intended decisions; and
- afford the employee a reasonable opportunity to make submissions in respect of such intended decisions.

Any submission made by or on behalf of an employee in response to allegations must be objectively and personally considered by the relevant decision maker. A decision maker will fall into error by merely adopting ('rubber stamping') the views of another person.

Similarly, where a decision maker intends to impose a disciplinary sanction(s) or take disciplinary action against an employee on the basis of proven misconduct; or to make another decision adverse to an employee on the basis of misconduct or other unsatisfactory performance; they must put the employee and/or their representative on notice as to the intended decision(s); afford them a reasonable opportunity to make submissions in response; and objectively and personally take into account any submission by them or on their behalf<sup>6</sup>.

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<sup>3</sup> Also refer to 'Hear the other side' Flick G (1984) *Natural Justice – Principles and Practical Application* – second edition, Butterworths, Sydney, p.26.

<sup>4</sup> There will occasionally be situations where it is inappropriate to provide copies of evidentiary material to an employee (e.g. when it consists of pornographic images). In such cases, the employee should be invited to inspect the material.

<sup>5</sup> Save for information that is protected by a privilege or immunity, i.e. legal advice.

<sup>6</sup> In the context of alleged misconduct, intended sanctions(s)/disciplinary action in the event allegations are found proven can sometimes be included in the same correspondence that puts allegations to the relevant employee.

### 2.1.2 The rule against bias

The rule against bias requires that a decision maker should be disinterested and/or unbiased in the matter to be decided. Justice should not only be done, but be seen to be done. If a fair-minded person would reasonably suspect that the decision maker has prejudged the matter, the rule is breached (referred to as 'a reasonable apprehension of bias').

A breach of this rule is most easily established when the person who is in the position of accuser is also the decision maker; participates in the investigation/decision; or gives advice throughout the course of the matter; or the decision maker does not objectively and personally perform their role but merely adopts or 'rubber stamps' the views of others.

### 2.1.3 The no evidence rule

The no evidence rule means, in essence that the decision that is eventually made must be based on logical probative evidence (proven on the balance of probabilities – that is, the alleged behaviour is more likely to have occurred than not). The more serious the matter and thus the likely consequence if found to be proven, the greater the decision maker should be satisfied that they are proven as a matter of fact.

### 2.1.4 Sound administrative/managerial decision making

Decision makers must take into account all relevant considerations. Matters relevant in the context of this Guideline include the nature and seriousness of the alleged behaviour under examination; the procedure adopted by the decision maker in investigating suspected misconduct or managing or attempting to manage other unsatisfactory performance; evidence gathered during an investigation; the response by or on behalf of an employee to allegations of misconduct or in the context of other unsatisfactory performance; and the employee's relative seniority and general employment history.

Decision makers must not take into account irrelevant considerations. Matters such as an employee's political beliefs, religion, sexual orientation, ethnicity, age, caring responsibilities, pregnancy, marital status, etc. would be irrelevant considerations and if considered, would amount to unlawful discrimination.

A decision maker must also act for a **proper purpose** and is not to exercise their power unreasonably. **Reasonableness** is an essential element of valid administrative decision-making. An unreasonable decision is (in the context of administrative law) 'a decision which lacks an evident and intelligible justification'<sup>7</sup>.

## 3 UNSATISFACTORY PERFORMANCE

To assist in evaluating and developing the performance of all public sector employees, public sector agencies are required to have performance management and development systems in place in accordance with section 8 of the PS Act and the *Direction of the Premier: Performance Management and Development*. Further guidance on performance development and management is available in the *Guideline of the Commissioner for Public Sector Employment: Performance Management and Development*.

Evaluation of the adequacy by a public sector employee of the duties or their role includes an objective assessment of their entire conduct as a public sector employee or connected to such employment (i.e. their adherence to the Code of Ethics for the South Australian Public Sector: both

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<sup>7</sup> Minister for Immigration and Citizenship v Li (2013) 249 CLR 332.

the Public Sector Values and Professional Conduct Standards), not merely of how well they perform the technical aspects of their duties. This means that conduct or behaviour by a public sector employee during or connected to public sector employment may be relevant as well as how adequately they perform the technical functions of their role.

### **3.1 EFFECTIVELY ADDRESSING APPARENTLY MINOR UNSATISFACTORY EMPLOYEE PERFORMANCE**

Wherever possible, early intervention is optimal. When a decision maker or other manager becomes aware of unsatisfactory performance by an employee they should raise this with the employee in a tactful and constructive manner at the earliest opportunity. Conduct that may constitute minor apparent misconduct (e.g. repeated attendance issues or less serious incidents of contravention or failure to comply with managerial directions) may also be dealt with as unsatisfactory performance (including misconduct). The appropriate approach is a matter for the exercise of discretion for decision makers taking into account the particular facts and circumstances.

A failure to address unsatisfactory employee performance (including conduct) in a timely manner may be construed as managerial condonation of the unsatisfactory performance and/or may render the issue(s) more difficult to manage in due course.

Unsatisfactory performance by an employee may not be wilful or entirely within the employee's control, but may be caused or contributed to by a number of work and non-work-related factors i.e.:

- interpersonal conflict with other employees;
- personal problems outside the workplace which may include an employee suffering from or escaping domestic/family violence<sup>8</sup>;
- poor communication and/or understanding of expected work outcomes;
- lack of knowledge and/or training;
- incapacity, illness or injury; and/or
- substance abuse, e.g. alcohol or other drugs.

Effective management of unsatisfactory performance by an employee should include:

- decision makers and other managers providing an employee with a clear and objective explanation/or demonstrating in an objective manner how it is that their performance is unsatisfactory;
- management providing the employee with a clear understanding of what constitutes appropriate/satisfactory performance such as by specifying in writing expected outcomes, goals, objectives and standards; wherever reasonably possible, in a measurable way;
- identifying, where possible, the underlying cause(s) of the unsatisfactory performance; and
- providing reasonable time, assistance and support to the employee to assist them to rectify the unsatisfactory performance.

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<sup>8</sup> The *Guideline of the Commissioner for Public Sector Employment: Domestic and Family Violence* provides additional information on supporting employees who are suffering from or escaping domestic/family violence, by helping them to maintain their employment while supporting them to take action to break the cycle of domestic/family violence.

Any applicable process(es) should be as constructive and supportive as reasonably possible with a focus, wherever possible, on assisting an employee to rectify their unsatisfactory performance and perform their duties consistently in a satisfactory manner.

It is not possible to propose a specified timeframe to be provided to an employee for them to rectify their unsatisfactory performance whilst attempts are being made to manage it in either an informal or formal way; or similarly, how long a manager(s) should attempt to respond to unsatisfactory performance by way of informal measures before implementing a formal response.

Decision makers need to exercise judgement and discretion appropriate to the specific facts and circumstances and to seek specialist advice wherever necessary or prudent.

### **3.2 UNSATISFACTORY PERFORMANCE DUE TO SUSPECTED OR ACTUAL MENTAL OR PHYSICAL CAPACITY**

Sometimes an employee's unsatisfactory performance may be due to their mental or physical incapacity. In these instances, information is required to be sought to inform the decision maker or the manager as to the employee's ability to perform their duties and may take the form of information provided by the employee's treating medical practitioner/s or specialist/s; reports from medical examinations; and/or other assessments (e.g. vocational assessments).

Decision makers and those assisting them should refer to the *Guideline of the Commissioner for Public Sector Employment – Power to Require Medical Examination* but in short, a decision maker may require an employee to undergo a medical examination(s), for example, where they either refuse to provide medical information derived by them personally or to authorise their treating practitioner(s) to share information; or where medical information derived from a treating practitioner(s) is inconsistent with the factual circumstances of the employee.

#### **3.2.1 Authority to require an independent medical examination**

Some public sector employment legislation provides authority to chief executives, agency heads or delegates to require (direct) an employee to undergo an independent medical examination. For example, for employment to which Part 7 of the PS Act applies, section 56 provides such authority, as does regulation 22(4) of the *Public Sector Regulations 2010* (depending on the circumstances). Section 56 of the PS Act empowers a decision maker to direct an employee to undergo a medical examination by an independent medical practitioner in circumstances where the employee is performing the duties of their role unsatisfactorily and it appears to the decision maker that such unsatisfactory performance may be caused by mental or physical incapacity.

For employees to whom Part 7 of the PS Act does not apply and where there is no other legislative authority empowering a decision maker to require medical examination of employees, there is a power at common law to require an employee to undergo a medical examination under certain circumstances. This includes where an employee is performing their duties unsatisfactorily and it reasonably appears such unsatisfactory performance may be caused by mental or physical incapacity. Decision makers and Human Resources practitioners assisting them should consider whether they should seek legal advice from the Crown Solicitor's Office.

#### **3.2.2 Applicable principles**

In circumstances where unsatisfactory performance by an employee is reasonably believed to be caused by mental or physical incapacity, decision makers should refer to the *Guideline of the Commissioner for Public Sector Employment – Power to Require Medical Examination* and should consider the following:

- all communications and processes must be conducted with tact and discretion and the employee is to be treated with sensitivity and respect;

- reasonable attempts should be made to ascertain medical information from the employee, as provided by their treating medical practitioner(s);
- medical information should be shared and stored appropriately, in view of its inherent confidentiality;
- an independent medical examination should be performed by a relevant medical specialist(s), not a General Practitioner. Where an employee may have a mental incapacity, they should be required to attend for examination by a psychiatrist, not a psychologist. A psychologist is not a medical practitioner;
- a panel of relevant specialists must be provided to the employee to choose from. This must contain at least two choices. (Injury Management personnel in agencies may be able to provide names of suitable medical specialists.);
- employees required to attend an independent medical examination are also required to cooperate with the medical practitioner to enable a proper examination and diagnosis/prognosis;
- for employees covered by Part 7 of the PS Act, if an employee fails, without reasonable excuse, to submit to a medical examination, they may be suspended from duty without remuneration until such time as they do submit to the examination.
- for employees not covered by Part 7 of the PS Act and who are not covered by a similar legislative regime, they may be disciplined for the failure to comply with a lawful and reasonable direction; and
- decision makers must comply with the rules of procedural fairness.

### **3.2.3 Direction to remain absent from the workplace**

Where there are grounds for directing an employee to undergo a medical examination on account of unsatisfactory performance, it will often be the case that management may reasonably conclude that the employee poses a risk to the health, safety or welfare of themselves or others. Where this is the case and it is not possible to make reasonable modifications to enable the employee to perform the inherent requirements of their role/duties, the employee should be directed to work in another work location(s) or to leave and remain absent from duty until further notice, pending consideration of medical information and any further processes arising.

Employees can be permitted to work when/if they produce medical certification that they are fit and able to perform the inherent requirements of their role/duties without restriction.

When employees are not fit to perform their duties on this basis, they are not entitled to be remunerated and must access accrued entitlements to paid leave in order to be remunerated.

### **3.2.4 Consideration of medical information by the decision maker**

In addition to any relevant legislation governing an employee's employment, the options available to a decision maker will be significantly informed by medical information derived from an employee's treating medical practitioner(s) and/or via independent medical examination(s).

Following consideration of all relevant information pertaining to an employee's unsatisfactory performance and any medical incapacity, the options available to a decision maker include:

- initiation or continuation of performance management measures;
- consideration of reasonable modifications to the employee's duties and/or workplace to allow them to perform the inherent requirements of their role/duties in a satisfactory manner;
- consideration of agreeing with the employee to amend the terms and conditions of their employment in the short, medium or long term – e.g. part time arrangements or employment in a different role<sup>9</sup>;
- transfer of the employee to other duties, subject to affording them procedural fairness<sup>10</sup>;
- for employees to whom Part 7 of the PS Act applies, reduction in the employee's remuneration level under section 53(1)(b) of the PS Act (combined with assignment or transfer of them to duties under section 47 or 9) but only after the agency (decision maker) has made reasonable endeavours to find and has failed to find suitable alternative public sector employment into which the employee may be assigned or transferred that maintains their substantive remuneration level; or
- for employees to whom Part 7 of the PS Act applies, termination of employment under section 54(1)(b) of the PS Act but only after the agency (decision maker) has made reasonable endeavours to find and has failed to find suitable alternative public sector employment into which the employee may be assigned or transferred that maintains their substantive remuneration level and only after the agency has complied with section 54(3) (inform and seek advice from the Commissioner for Public Sector Employment (CPSE)).

The requirements of the *Equal Opportunity Act 1984* (SA) and the *Disability Discrimination Act 1992* (Cth) relating to unlawful discrimination based on disability must be considered - including that employers (the Crown, through employing authorities in the form of chief executives, agency heads or delegates) must make reasonable adjustments to the role or work environment of an employee with a disability, if this will enable them to perform the inherent requirements of their position. The definition of disability is very broad and decision makers or those assisting them may consider seeking legal advice from the Crown Solicitor's Office on the application of anti-discrimination legislation.

Where medical information from the employee's treating medical practitioner/s and/or from the independent medical specialist/s confirms that the employee is unable to perform their duties satisfactorily due to medical incapacity; and it is not possible to make reasonable modifications to enable the employee to perform the inherent requirements of their role/duties; and it is not in the circumstances possible to transfer them temporarily to alternative duties and/or an alternative location(s); the employee should be directed to remain absent from the workplace and only permitted to return to work when/if they produce medical certification that they are fit and able to perform their duties without restriction, or with reasonable modifications.

In such circumstances, an employee is not entitled to be remunerated and must access accrued entitlements to paid leave in order to be remunerated.

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<sup>9</sup> This would go beyond reasonable modifications so as to permit an employee to perform the inherent duties of their substantive role and would be dependent, inter alia, on operational considerations.

<sup>10</sup> And for employees employed under Part 7 of the PS Act, thereafter assign them duties under section 47 of the PS Act.

### 3.3 POSSIBLE ADVERSE ACTION IN RESPONSE TO UNSATISFACTORY EMPLOYEE PERFORMANCE

For unsatisfactory employee performance (including misconduct), not caused by mental or physical incapacity the following applies.

Where employment is covered by Part 7 of the PS Act, possible adverse action against an employee as a consequence of unsatisfactory performance (including misconduct) is:

- a reduction in remuneration pursuant to section 53(1)(c) of the PS Act; and/or
- transfer of them to a different role/duties and/or workplace(s) pursuant to section 9 of the PS Act; or
- termination of employment pursuant to section 54(1)(c) of the PS Act (following compliance with section 54(3)<sup>11</sup>).

For employment not covered by Part 7 of the PS Act\*, possible adverse action on account of unsatisfactory performance (including misconduct) is:

- the issue of a warning (including a final warning or one of a series of warnings); and/or
- transfer to another role/duties per section 9 of the PS Act; or
- termination of employment.

In the context of any public sector employment, it may be appropriate in particular circumstances to continue with some form of formal performance management and/or require an employee to undergo particular training and/or education separate from or in addition to adverse consequences.

In relation to unsatisfactory performance caused by mental or physical incapacity the following applies.

For employment covered by Part 7 of the PS Act, possible adverse action is:

- a reduction in remuneration per section 53(1)(b), subject to compliance with section 54(2); and/or
- transfer to another role/duties and/or workplace(s); or
- termination of employment, subject to compliance with section 54(2) and section 54(3)<sup>12</sup>.

For employment not covered by Part 7 of the PS Act\*, possible adverse action is:

- transfer to another role/duties and/or workplaces per section 9 of the PS Act; or
- termination of employment.

\*It is noted that legislation other than the PS Act governing certain cohorts of public sector employment contain particular possible adverse outcomes for such cohorts (i.e. the *Police Act 1998*).

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<sup>11</sup> Where it applies.

<sup>12</sup> Where applicable.

## **4 SUSPECTED ALLEGED AND PROVEN UNSATISFACTORY EMPLOYEE PERFORMANCE IN THE NATURE OF MISCONDUCT**

A definition of 'misconduct' is provided in Section 1.2 of this Guideline.

### **4.1 CONFIDENTIALITY**

Decision makers and officers assisting them must ensure that information relating to suspected, alleged and/or proven employee misconduct are stored and otherwise managed with appropriate confidentiality with regard to the *State Records Act 1997* and the destruction schedules issued under that Act and the Information Privacy Principles.

#### **4.1.1 No obligation to inform an employee an investigation is intended or underway**

There is no obligation to inform an employee that an investigation into their suspected conduct is intended or underway. In most circumstances employees will know that their suspected conduct is the subject of investigation however there will be situations where it is prudent not to alert the employee. Examples include when it is possible that alerting the employee might result in the destruction of evidence.

The function to conduct an investigation of suspected misconduct is inherent to the employer – employee relationship and a matter of managerial prerogative.

#### **4.1.2 Powers of the Commissioner for Public Sector Employment**

The CPSE has coercive investigative powers under section 18 of the PS Act. When appropriate, the CPSE can delegate these powers to another person on a case-by-case basis. The use of coercive powers would be required only in exceptional circumstances.

### **4.2 SUSPENSION FROM DUTY**

A decision to suspend an employee from duty is a serious one that needs to be made with significant care and following the provision of procedural fairness to the employee.

#### **4.2.1 Is suspension from duty appropriate in the particular circumstances?**

A decision maker should always first consider if it is viable for the employee to perform alternative duties and/or their substantive duties from another location(s), including from home, as an alternative to suspension from duty. Consideration should be given to relevant matters prior to a decision to suspend an employee from duty, including:

- the relative seriousness of the suspected misconduct;
- the prospect of the employee destroying or tampering with evidence;
- work health and safety considerations; and
- the possible embarrassment/reputational harm to the chief executive/agency head, agency, public sector and/or Minister and/or Government should it become publicly known that the employee has been permitted to remain at work whilst suspected of the relevant misconduct.

It is noted, that tribunals or courts may be critical of decision makers where they do not suspend an employee from duty in circumstances where such decision may have been appropriate. If employment is terminated, and the outcome contested, it is likely a tribunal or court will question

the seriousness with which the decision maker viewed the conduct if they permitted the employee to remain on duty. As also mentioned later, there is an added impetus on decision makers to expedite processes when an employee is suspended from duty and tribunals and courts are regularly critical where employees are suspended from duty for lengthy periods without compelling reasons.

#### **4.2.2 Direction to remain absent compared to suspension from duty**

Sometimes it is appropriate to direct an employee to leave and remain absent from duty in circumstances where they are suspected to have committed misconduct (for example in urgent, pressing circumstances). However, a managerial direction is not a substitute for suspension from duty and thus if an employee has been directed to remain absent and it is not considered appropriate that they return to duty; a decision maker should afford the employee procedural fairness and make a decision as to whether to suspend them from duty in as timely a manner as possible.

#### **4.2.3 Managerial directions to an employee while suspended from duty**

If suspension from duty is appropriate, a chief executive/agency head or delegate would normally issue the employee with managerial directions to apply during the period of the suspension from duty.

Common managerial directions include ones requiring an employee for a specific period or until further notice:

- not to attend at the workplace(s) of the relevant agency;
- not to contact a particular employee(s) or, in exceptional circumstances, any other employees except for a designated contact (including, if appropriate, outside of working hours);
- not to discuss the matter under investigation with any person apart from their spouse or partner, medical practitioner(s), counsellor(s), union or legal adviser(s) or as otherwise required by law;
- to return any property of the Crown in their possession – including access and identity cards; and
- to remain contactable during normal working hours.

#### **4.2.4 Suspension from duty without remuneration**

Unless there is legislative power to suspend an employee from duty without remuneration, the suspension of an employee from duty is to be with remuneration.

For employment covered by Part 7 of the PS Act (and for certain other cohorts of public sector employment covered by similar legislative regimes), section 57 of the PS Act empowers decision makers to suspend employees from duty without remuneration in particular circumstances. Aside from when an employee is charged with a criminal offence punishable by imprisonment, the PS Act provides that an employee cannot be suspended without remuneration until they have been given notice of the allegations against them and have been provided an opportunity to respond as to why they should not be disciplined. As such, suspension without remuneration should only occur towards the end of a disciplinary process.

A decision maker would only consider suspension of an employee from duty without remuneration, where the relevant alleged misconduct was serious in nature and termination of employment of the employee is the likely outcome of the disciplinary process.

**Note:** When employees are suspended without remuneration, chief executives, agency heads or delegates should favourably consider applications from them to engage in secondary remunerative employment or business, subject to the usual requirements in terms of conflict of interest. Chief executives, agency heads or delegates should approve applications by such employees for access to accrued entitlements to recreation and long service leave.

## 5 ELEMENTS OF AN UNEXCEPTIONAL DISCIPLINARY PROCESS

The below diagram provides guidance on the general elements of an unexceptional disciplinary process.

Again, it is important to note that there is no ‘one size fits all’ approach to managing the process. Each situation must be managed according to its individual facts and circumstances.

<p><b>FORMATION OF SUSPICION</b></p>	<p>A chief executive, agency head or delegate (decision maker) forms a suspicion that an employee has committed misconduct</p>
<p><b>INVESTIGATION</b></p>	<p>Where required, an investigation is conducted to gather evidence to inform a decision maker as to whether, on the face of it, an employee has committed misconduct</p>
<p><b>MAKE FINDINGS OF FACT AND FORM INTENT AS TO DISCIPLINARY SANCTION(S)/ACTION AND/OR OTHER ADVERSE ACTION; AND PUT EMPLOYEE ON NOTICE</b></p>	<p>After taking into account all relevant considerations including any submission by or on behalf of the employee, the decision maker decides whether the allegations (some or all) are proven on the balance of probabilities. If so, they then form an intent as to the imposition of disciplinary sanction(s)/action and/or other adverse action; and advise the employee of their findings of fact and put them on notice of their intended decisions arising; and give the employee a reasonable opportunity to respond.</p>
<p><b>MAKE FINDINGS AND INTENDED DISCIPLINARY SANCTION(S)/ ACTION AND/OR OTHER ADVERSE ACTION</b></p>	<p>Following consideration of the employee’s response to the allegations, the agency makes findings of misconduct and notifies the employee of this decision and the intended disciplinary sanction(s)/action and/or other adverse action. The employee is provided with an opportunity to respond to the intended disciplinary sanction(s)/action and/or other adverse action.</p>

## **AFFECT DISCIPLINARY SANCTION(S)/ACTION AND/OR OTHER ADVERSE ACTION**

After taking into account all relevant considerations, including any submission by or on behalf of the employee, the decision maker makes and affects their decision as to disciplinary sanction(s)/action and/or other adverse action. The employee then may utilise any right of review/appeal available to them. Records are stored appropriately.

Note that in some circumstances, including where alleged misconduct is not unduly complex in nature and there is strong apparent evidence supporting allegations, and where termination of employment is not under consideration as a sanction or action, it is possible for a decision maker to put an employee on notice as to intended disciplinary sanction(s)/action and/or other adverse action, in the event allegations are found proven; and to invite a response from the employee; at the same time (in the same correspondence) as putting allegations to them.

If decision makers or officers assisting them are unsure as to whether this approach is appropriate in given circumstances, they should seek specialist human resource or legal advice.

### **5.1 FORMING A SUSPICION OF EMPLOYEE MISCONDUCT**

Information may come to the attention of a chief executive, agency head or delegate from a variety of sources, giving rise to a suspicion of misconduct on the part of a public sector employee they are responsible for.

Note that all employees are under an obligation per the Code of Ethics for the South Australian Public Sector to, in summary, report to a relevant authority suspected workplace conduct that they reasonably suspect constitutes misconduct.

Refer later to obligations under the Directions of the Independent Commissioner Against Corruption.

### **5.2 INVESTIGATION**

Often, an investigation is necessary following the formation of suspicions of employee misconduct.

The object of any investigation is to seek to gather probative evidence and other relevant material to inform a decision maker as to whether they suspect an employee has committed misconduct such that the decision maker ought to put allegations of misconduct to the employee.

It is important to note that persons participating in an investigation (e.g. the investigator/s) should, in the vast majority of circumstances, not act as the decision maker and/or impose a sanction/s upon an employee. It is the investigator's role to obtain the facts and relevant information of the suspected/alleged misconduct for the decision maker's consideration and determination/s. Investigators should not purport to make findings as this is the role of the decision maker.

The decision maker in disciplinary processes is often the chief executive or agency head, however the role of decision maker can be delegated to another appropriately senior representative of the agency, such as the Executive Director or Director responsible for the human resource function. The appropriate delegation of the decision making powers with respect to employee misconduct should assist agencies to expedite disciplinary processes.

Decision makers are to take into account all relevant considerations, including evidence. The rules of evidence do not apply in the employment setting and therefore it is permissible for a decision maker to take into account hearsay (second-hand) evidence. However, the weight of such evidence will generally be lower than first-hand evidence.

An investigation may include, where appropriate, interview of the employee suspected to have committed misconduct however this is rarely necessary from an evidentiary perspective. Further, save for when a legislation power is being relied upon<sup>13</sup>, public sector employees suspected of committing misconduct cannot be compelled to answer questions.

### **5.2.1 Choosing an investigator**

Depending on the nature of the suspected conduct under investigation, investigations can be conducted by local management or human resources practitioners or, where specialist investigation skills are required, an agency's specialist investigation unit, a Government Investigator employed in the Crown Solicitor's Office, or a private investigator – either from a panel of providers accessed through the Crown Solicitor's Office or through direct contract with an officer with appropriate delegated authority.

Where suspected or alleged misconduct consists of behaviour that a reasonable person would suspect is criminal in nature, there is an obligation on all public sector employees to report such conduct to the South Australia Police<sup>14</sup>. It is important that management or public sector investigators liaise closely with police and if concurrent police and administrative/employment investigations are possible and appropriate, that they be conducted in a coordinated manner.

There is no barrier to agencies continuing to investigate and/or otherwise deal with incidents of suspected/alleged/proven misconduct if an employee is charged with a criminal offence. This includes finalising disciplinary processes whilst criminal investigations/proceedings are unresolved. Human resources and/or legal advice should be sought in such circumstances.

Whether it is appropriate, practical or even possible to conduct a disciplinary investigation and/or process pending a criminal process will depend on the facts and circumstances of the matter and in particular, the suspected conduct of the employee. It will not be possible to continue some processes due to the involvement of another agency such as the Independent Commissioner Against Corruption. Some conduct will not be conducive to a separate administrative/disciplinary investigation or other processes and the chief executive/agency head or delegate will need to await the outcome of the criminal process.

### **5.2.2 Planning an investigation**

Prior to commencing an investigation, the investigator/officer to conduct the investigation may benefit from preparing an investigation plan. A plan does not need to be overly complex but should provide a general guide as to how the investigation will be conducted. This will assist in estimating the timeframe for completion through:

- identifying and scheduling potential witnesses to be interviewed;
- identifying likely relevant documents that need collating and/or analysing; and
- preparation of an investigation report.

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<sup>13</sup> i.e. section 18 of the PS Act.

<sup>14</sup> In addition to an obligation to report to the Office for Public Integrity.

## 5.3 INTERVIEWS AND OTHER GATHERING OF EVIDENCE

Interviewing of either witnesses, potential witnesses or employees suspected of committing misconduct is not mandatory and is merely a means of collecting evidence in order to inform a decision maker. Interviews should not be conducted for the sake of it as some automated, self-imposed process but fundamentally, only when they will likely provide probative evidential value and/or there is some other substantial reason to conduct an interview(s). This includes that it may be unnecessary to interview all potential witnesses to suspected conduct where one or more witnesses provide apparently clear evidence.

Records of interview or notes of observations should be made either at the time of the event or as soon as possible following. Where notes relate to conversations they should be recorded in dialogue form using, as much as is reasonably possible, the actual language used.

It should be noted that a chief executive/agency head or delegate may direct an employee to attend at a place at a certain date and time for the purposes of an interview. Unless the person conducting the investigation is operating under a legislative power such as section 18 of the PS Act, a public sector employee suspected of having committed misconduct cannot be compelled.

Management or employees may audio record meetings or interviews and neither require the other's permission to do so. However, it is important that any recording is done openly as surreptitious recordings may amount to a criminal offence.

Where necessary and relevant to an investigation, management may seize or order the return of Government (Crown) equipment/assets. Employees have no proprietary right in Government assets.

Every effort should be made to collect material that is relevant to and supportive of suspected misconduct as soon as practical.

Where statements are taken in the course of an interview, care should be taken that observations of witnesses are thoroughly recorded in their own words but alleged statements of others (such as threats or offensive language) are to be in the form of dialogue, using, wherever possible, the actual words used/heard (including, as relevant, language that might be considered vulgar or otherwise offensive).

Employees who are potential witnesses to suspected workplace misconduct should be reminded that they are obliged under the Code of Ethics for the South Australian Public Sector to assist a decision maker and therefore may be subjected to a lawful and reasonable direction to do so.

An interviewer should provide their contact details to an interviewee and invite them to contact them should they wish to provide further information or clarity in respect of anything conveyed during the interview.

If an interviewee becomes upset or shows a high level of other emotional stress during the interview, it may be appropriate for the investigator to offer a short recess, or reconvene at another time if appropriate. It would also be appropriate to mention other assistance available such as an agency's Employee Assistance Program.

### 5.3.1 Conducting an interview – general advice

Interviews as part of the investigation of suspected misconduct can be quite stressful for witnesses and others. In addition to points made elsewhere in this Guideline, there are a number of important considerations that can help an investigator/officer conducting an interview(s) ensure interviews run as smoothly as possible.

When planning an interview, the investigator/officer instructing the investigator or conducting an investigation should give some consideration to possible issues around the employee's gender,

age, and intellectual and emotional capacity. At times, alternative ways of gathering evidence (other than a formal interview) may be necessary or more appropriate.

It is recommended that in most cases, interviews do not exceed two hours in duration, as excessively long interviews can be exhausting for both the investigator and the interviewee. A long interview can also impact on the quality of the evidence as concentration levels drop. If there is a large amount of material to cover, the investigator/officer conducting an investigation may need to interview witnesses or the employee more than once, or at least take reasonable breaks where interviews exceed two hours in duration.

The investigator's/officer's physical safety should be an important consideration when choosing the location of the interview and those persons to be present. An investigator/officer should not presume that issues of safety are not relevant because the matter is administrative in nature.

The order in which people are interviewed is important and should be considered when the investigator creates an investigation plan. Other witnesses should be interviewed before the employee so that their information can be assessed for its relevance to the case and presented to the employee for comment if necessary.

It may be useful to have someone else sit in and assist the investigator/officer with the interview or otherwise act as a witness. The role of this person may be to record the proceedings or to be a formal witness, or simply to observe the interview and reflect upon any lines of inquiry the interviewer may have missed. If it is the first time the investigator/officer has conducted a disciplinary investigation, it is recommended that they seek guidance from a more experienced interviewer or investigator.

It is highly advisable that the investigator/officer plans the questions they will ask during interview and carefully arrange any documents or exhibits they need or desire to present to the interviewee. A series of planned questions will provide the investigator with a logical structure to follow and can assist them to bring the interview 'back on track' should the interviewee digress onto other matters. However, significant care should be taken to avoid a rigid, inflexible approach where an interviewer sticks slavishly to planned questions.

Investigators/officers need to be prepared to ask questions that naturally arise from answers given to planned questions and/or to explore unplanned lines of inquiry that may arise during the course of the interview. In fact, a certain degree of flexibility is usually required in any interview process.

There may be times when the interviewee brings up other matters that have clearly have limited or no relevance to the investigation. In this case, the investigator/officer will need to consider if they should redirect the interview back to relevant matters, or alter the direction of questioning. In some instances, it may be useful to let an interviewee digress and let them talk, even at length, about other matters. Often, important information can be gleaned while a person is speaking about matters which at first didn't appear directly relevant to the investigation.

In most circumstances, it will be appropriate for the investigator/officer to advise a witness prior to, or at the commencement of an interview how their evidence might be used and whether the employee will be provided with any information that might allow the witness to be identified. It may – and usually is - not always be possible for the identity of a witness to remain confidential, as it may be necessary to provide their evidence to other witnesses, to the employee suspected of misconduct, or to another agency/ies, depending on the nature of the allegations and other circumstances of the case.

### **5.3.2 Collating relevant material**

Depending on the nature of the suspected misconduct, relevant documents and material may be required. These may include, but are not limited to:

- the Code of Ethics for the South Australian Public Sector;
- witness statements or records of interview;
- video or audio recordings;
- letters, minutes, memorandums, emails etc. between the decision maker and/or investigator and the employee and/or their representative;
- hand written or typed notes;
- medical information or reports (if applicable);
- the relevant employee's personal file;
- the Role Description (or similar document) relevant to the duties or position being undertaken by the employee under investigation and in some circumstances, in relation to roles performed by other employees;
- relevant legislation or industrial instruments;
- Directions of the Premier; and/or
- whole-of-Government or agency specific policy, guidelines and/or procedures.

### **5.3.3 Role of support persons in interviews**

Employees suspected of misconduct, or whose performance a decision maker asserts is otherwise unsatisfactory, must be permitted to be accompanied by a support person during interviews if requested; so long as such requests are reasonable in the particular facts and circumstances. Witnesses who request the presence of a support person during interview should also be afforded this opportunity, providing that the intended support person is appropriate in the circumstances.

Any support person should be someone who is not a prospective witness in the matter, or implicated in the suspected conduct of the employee. If an officer is in doubt as the appropriateness of a proposed witness, they should seek Human Resources or legal advice.

It is not uncommon for a support person to also be in the role of representative of the employee. Whilst in an interview or other administrative setting such support people are not representing an employee as they would in a tribunal or court, they should be given a reasonable opportunity to speak in support of an employee and not be 'gagged'. The employee and support person/representative should also be provided a reasonable opportunity to confer.

On rare occasions, the employee may need someone to articulate their answers for them, given a genuine inability to respond verbally on account of a disability. In these instances, the person responding is acting as a representative of the person being interviewed; however, this does not alter the fact that they are assisting the interviewee and are not being interviewed themselves.

There is no single way for officers to respond if persons present at interviews as support persons continually interject, become aggressive, use profane or abusive language, or otherwise behave in an objectively improper manner. Investigators/officers conducting investigations will need to exercise considerable discretion and judgement and may in some cases need to seek advice from others and in extreme cases, call a halt to the interview; and seek specialist advice.

## 5.4 ANALYSIS OF EVIDENCE AND OTHER INFORMATION

The evidence and other information gathered should be prior to the preparation of a document for the benefit of the decision maker, commonly labelled as an investigation report. The following may be relevant:

- where facts are in dispute, where possible, corroborative evidence should be obtained;
- the apparent credibility of witnesses (and their evidence) may be a factor that should be highlighted to the decision maker; and
- whilst care should be taken to avoid assumptions, it may be appropriate for the investigator to draw inferences from particular evidence, or lack thereof when proposing to the decision maker, what inferences/findings it is said are reasonably open to them.

## 5.5 INVESTIGATION REPORTS

A fundamental purpose of reports commonly labelled as an investigation report is to accompany evidence and other information relevant to a matter, for the purpose of informing a decision maker in their task of whether they suspect, on reasonable grounds, an employee has suspected misconduct. A further purpose is to arm the decision maker with the necessary information to enable them to articulate allegations to an employee and afford the employee procedural fairness.

An investigator/officer preparing a document labelled as an investigation report or similar is not the decision maker and must refrain from purporting to make findings; or advising the decision maker in a way that is tantamount to inviting the decision maker to simply adopt or 'rubber stamp' ostensible findings. It is permissible and in fact in many cases helpful to advise a decision maker as to what findings it is said are reasonably open to them and why.

### 5.5.1 Structure of a report

Each investigation and the related circumstances will vary, and therefore the report structure and style should also vary. The main consideration is to ensure the evidence and other relevant information is presented logically and coherently to assist the decision maker in their task.

A possible structure could be:

- Index;
- Executive summary;
- Background;
  - a summary of the suspected conduct and the scope of the investigation/instructions;
- Methodology (how the investigation was undertaken);
- Evidence;
  - interview summaries or witness statements;
  - documentary evidence and other information;
- The suspect employee's explanation/contentions;
- Assessment and analysis of evidence – what findings of fact may reasonably be open to the decision maker;

- Attachments;
  - interview transcripts, policies, procedures etc.

An investigator should be mindful that the employee may be given a copy of the report in some form, either under a Freedom of Information request, or revealed in a court or tribunal. The investigator will need to consider this especially when deciding if it is necessary to include direct references to witnesses and the information they provided. Public sector employees are bound to assist with investigations in to suspected employee misconduct.

## 5.6 PROCEDURAL FAIRNESS IN THE CONTEXT OF MISCONDUCT

Satisfying the rules of procedural fairness will vary according to the individual facts and circumstances of a matter.

Sometimes (but not always<sup>15</sup>) it will be necessary or prudent to facilitate interview of an employee suspected of having committed misconduct as part of an investigation/information gathering process. Public sector employees suspected or alleged to have committed misconduct cannot be directed to answer questions<sup>16</sup> but may be directed to attend at a certain place at a given time for the purposes of an interview.

Interviewing an employee suspected of having committed misconduct may be prudent, it is not something that should occur as an automatic process in all investigations and it is unwise for chief executives, agency heads or delegates to adopt a practice of essentially automatically interviewing suspect employees. As well as being unnecessary from an evidentiary perspective, where such interviews are unnecessarily conducted or attempted, it only serves to extend the timeframe a matter is resolved within.

Decision makers and those assisting them need to decide on a case-by-case basis, in consideration of the particular facts and circumstances, as to whether such interview process would or may be sensible. It may be prudent to seek specialist Human Resources and/or legal advice.

### 5.6.1 Correspondence: Detailed and particularised allegations

Wherever possible, an investigation and/or disciplinary process following it should occur via correspondence. This involves a decision maker (chief executive, agency head or delegate) putting detailed and particularised allegations to the relevant employee in writing; providing them with copies of or access to information relied upon in support of the allegations; and affording the employee a reasonable opportunity to respond.

In some circumstances, it may also be possible and appropriate to put the employee on notice in correspondence putting allegations of misconduct to them of the sanction(s)/disciplinary action and/or other decision(s) the decision maker is contemplating if the allegations are found to be proven; and affording the employee a reasonable opportunity to make submissions on that issue.

Sometimes, it is appropriate for a staged approach: the putting of allegations and the making of findings of fact; and if allegations are found proven, advising the employee of the sanction(s)/disciplinary action and/or other adverse decision intended and affording a reasonable opportunity to respond. Any response/submission from or on behalf of an employee must be

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<sup>15</sup> This should not occur as a matter of course in respect of every matter, but only where it may assist from an evidentiary perspective or may be otherwise appropriate for policy reasons in the particular circumstances of a matter.

<sup>16</sup> Except where the interviewer is using the coercive powers under section 18 of the PS Act. Note, in general, employees outside the public sector can be subjected to a lawful and reasonable direction to truthfully answer questions in respect of suspected misconduct.

objectively considered by the decision maker before a formal decision by them is made and communicated to the employee.

### **5.6.2 Prospective disciplinary sanction(s)/action**

In summary, it will usually (but not always) be possible to put an employee on notice of prospective disciplinary sanction(s)/action in the event allegations are found proven, at the same time as putting allegations of misconduct to them, where the intended sanction(s)/action is less serious than termination of employment and there is the factual/evidential basis for the allegations are not overly complex.

Usually (but not always), where termination of employment is clearly a potential outcome should allegations be proven and/or the factual underpinning and evidence relied upon is complex, it will be appropriate for a decision maker to refrain from forming a view as to intended disciplinary sanction(s)/action and putting the relevant employee on notice of such intended decision, until after they have found allegations of misconduct proven. It may be prudent for decision makers and/or those assisting them to seek advice from the Crown Solicitor's Office if they are in doubt as to whether it is appropriate in given circumstances to include reference to prospective disciplinary sanction(s)/action in conjunction with allegations.

Naturally, where a decision maker has put an employee on notice of potential disciplinary sanction(s)/action in the event of them finding allegations proven and invited a response, and the decision maker subsequently reasonably forms a view that more severe sanction(s)/action than that initially envisaged is appropriate, it will be necessary for them to put the relevant employee on notice of such intended decision(s) and afford them a reasonable opportunity to respond. The decision maker will need to objectively and personally consider any responses by or on behalf of the employee, along with other relevant considerations before making and affecting their decision(s).

### **5.6.3 Standard of proof and 'Balance of Probabilities'**

The relevant standard of proof as to whether an employee has committed misconduct, or, in other words whether allegations against an employee are proven, is the balance of probabilities. In essence, this means the alleged conduct is more likely than not to have occurred. The more serious the allegations are, the more satisfied the decision maker (chief executive, agency head or delegate) needs to be that they are proven<sup>17</sup>.

## **6 FORMING SUSPICIONS, PUTTING ALLEGATIONS, MAKING FINDINGS AND POTENTIAL OUTCOMES**

### **6.1 FORMING A SUSPICION**

Following receipt of an investigation report (or other Minute or Memorandum) and any other relevant advice (e.g. legal advice); or in circumstances where there is information available and no investigation and/or advice is necessary; the decision maker is to consider whether they suspect, on reasonable grounds, that an employee has committed misconduct; and thus to commence a disciplinary process.

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<sup>17</sup> See *Briginshaw v Briginshaw* [1938] 60 CLR 336.

## 6.2 ALLEGATIONS TO THE EMPLOYEE SUSPECTED OF MISCONDUCT

On the basis of all gathered information, if a chief executive/agency head or delegate suspects on reasonable grounds that an employee has committed misconduct, they should put allegations to the employee in writing and afford the employee a reasonable opportunity to respond to the allegations in writing. The correspondence will include:

- a summary description of and reference to the particulars of the alleged conduct (what the employee is alleged to have done, in positive terms, not a description of evidence or other material relied upon);
- a list of evidence relied upon in support of the allegations including, where relevant, reference to any policy/ies the employee's alleged conduct is said not have complied with;
- an explanation of how the alleged conduct amounts to misconduct as defined in the PS Act (including setting out the particular provisions of the Professional Conduct Standards in the Code of Ethics that the employee's conduct is said to have contravened or failed to comply with);
- where appropriate, indicate the potential most serious sanction or other disciplinary action (as relevant) and/or other adverse action which could be imposed/taken if the allegations of misconduct are found proven;
- state that no decision on facts or sanctions has been made and will not be made until the employee has had the opportunity to respond and the response has been considered;
- a reasonable opportunity to the employee to respond to the allegations. What is a reasonable period will depend on the circumstances including the volume and/or complexity of the allegations (usually, but not always, 21 days from the date of receipt will be sufficient<sup>18</sup>); and
- as enclosures, copies of documentary material relied upon in support of the allegations except where it is not appropriate to provide such documents<sup>19</sup>, in which case they are made available for inspection by the employee and/or their representative.

The rules of procedural fairness dictate that the allegations should be specific enough to allow the employee to respond adequately. It is not sufficient to make broad or generalised allegations. It is always preferable to give the employee specific times and dates where possible. It may also be necessary to include further clarification following an outline of the allegations, particularly where the behaviour may have been demonstrated on a number of occasions or in more than one way.

It is not open to administrative decision makers to allege that an employee has committed criminal conduct unless a court has found them guilty of such conduct. For example, where no finding of a court has been made, it is not appropriate for a decision maker to allege an employee stole Government property or was guilty of larceny. Rather, proper allegations would allege the employee took possession of Government property so as to permanently deprive the Government/State and without any permission or authority.

Any response/submission received from the employee must be objectively considered by the decision maker before a formal decision by them is made and communicated to the employee in writing.

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<sup>18</sup> Sometimes a longer period will be appropriate and sometimes a shorter period – what is reasonable hinges on the particular facts and circumstances and involves an exercise of discretion on the part of the decision maker.

<sup>19</sup> Legal advice or other documents protected or subject to a privilege or immunity.

### **6.2.1 Employee is absent from duty due to incapacity**

Should an employee be absent from duty due to assertions of incapacity this should not necessarily delay a disciplinary process.

It may not be appropriate to require the employee to attend an interview, where the decision maker is sufficiently informed so as to form a suspicion on reasonable grounds and articulate allegations. Particularised allegations of misconduct can and should still be put to the employee and they should be afforded a reasonable opportunity to respond, unless there is clear cogent medical evidence this is not feasible/appropriate in the circumstances.

Decision makers will need to apply their discretion as to whether to provide extensions of time in which to respond to allegations to employees who provide evidence they are unwell in light of all relevant considerations.

It may be prudent for decision makers and/or those assisting them to seek Human Resources or legal advice.

### **6.3 DETERMINING APPROPRIATE SANCTION(S) OR DISCIPLINARY ACTION**

The decision maker (chief executive, agency head or delegate) must be satisfied that an employee has committed misconduct on the balance of probabilities; that an alleged event(s) is/are more likely to have occurred than not. The decision maker also is to consider whether fair procedure has been followed.

If a decision maker concludes that an allegation(s) is/are proven, the employee is liable to disciplinary action and a disciplinary sanction(s) may be imposed/action taken; and or other action adverse to the employee (i.e. transfer), subject to them having been afforded procedural fairness.

Relevant considerations for a decision maker in the context of proven employee misconduct and the imposition of a disciplinary sanction(s) or action upon an employee in response to such misconduct include:

- the relative seriousness of the relevant conduct;
- whether the employee admitted the conduct at the earliest available opportunity and demonstrated contrition;
- the relative seniority of the employee (in general, the more senior an employee, the higher the ethical expectations of them);
- the duration of service of the employee; and/or
- the employee's past employment record, in particular, whether there have been previous incidents of proven misconduct by the employee and if so, the nature of such conduct, when it occurred and the response/s of the decision maker(s).

Where an employee has been put on notice of prospective disciplinary sanction(s)/action in the event allegations are found as proven, given that the employee has already made submissions in mitigation of a more serious potential sanction(s) or action, it would ordinarily not be a denial of procedural fairness to not provide the employee with a further opportunity to make submissions in respect of the issue of disciplinary sanction(s)/action.

If, however, a decision maker is minded to impose a more severe sanction(s)/take more serious disciplinary action than that pre-empted; or is minded to take other action adverse to the employee not flagged; they should put the employee on notice of the intended decision and afford them a reasonable opportunity to respond. It follows that the decision maker is to objectively and personally consider any response by or on behalf of the employee.

## 7 DISCIPLINARY SANCTION(S) OR ACTION

It is solely the responsibility of the decision maker (chief executive/agency head or delegate) to objectively and personally consider any submission made by or on behalf of the employee; along with all other relevant considerations; before making a final decision as to the appropriate sanction/s or disciplinary action and/or other decision adverse to the employee (i.e. transfer of them to different duties whether independently or in conjunction with the imposition of disciplinary sanction(s)/taking of disciplinary action).

The decision maker will act to impose the sanction(s) or take/affect the action by advising the employee of their decision and facilitating the implementation of it/them.

The disciplinary sanctions or action available to a decision maker depend on the employment arrangements applicable to the employee subject to the disciplinary process.

In addition to the inherent seriousness of the particular misconduct (or for some cohorts, unsatisfactory performance), factors relevant in determining the appropriate disciplinary sanction(s)/action and/or other adverse action include:

- the duration of the employee's service and record of service including any previous incidents of proven misconduct or unsatisfactory performance and the outcome;
- how other employees have been treated in similar circumstances – keeping in mind that each matter is to be managed according to its individual facts;
- whether the employee has been made aware of the relevant policy/instruction breached, including relevant training, qualifications, and/or professional obligations;
- the employee's personal circumstances;
- whether the employee has admitted the conduct at an early juncture and expressed genuine remorse; and
- any mitigating circumstances.

### 7.1 DIFFERENT EMPLOYMENT ARRANGEMENTS

The only valid form of sanction(s) for persons employed under Part 7 of the PS Act are those issued pursuant to that Part of the Act (which provide a broader range of sanctions than available at common law)<sup>20</sup>.

There is no concept of a 'first and final' or 'last' warnings for employees employed under Part 7 of the Act. Any purported disciplinary action or sanction for misconduct; or adverse action in respect of other unsatisfactory performance; that occurs in a manner that is not consistent with the Act will be invalid and of no effect. Furthermore, decision makers will generally be constrained from remedying invalid action retrospectively (i.e. by purporting to impose proper sanction/s).

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<sup>20</sup> Some other public sector employment legislation contains similar provisions in the nature of a 'code', i.e. the *Education Act 1972*.

Disciplinary action available for employees whose employment is not covered by Part 7 of the PS Act are derived from common law (unless other legislation applies to the particular employment, providing broader options i.e. the *Education Act 1972*). Options at common law are a warning (single (including final) or one of a series); or termination of employment.

In the same way that an employee whose employment is covered by Part 7 of the PS Act, an employee whose employment is not covered by Part 7 of the PS Act may also be transferred to other duties in combination with the taking of disciplinary action.

A warning (for employment outside of Part 7 of the PS Act<sup>21</sup>) is (obviously) an outcome less serious than termination of an employee's employment and serves as both a specific deterrent to the individual employee and general deterrence to other employees; and will be relevant in the future if the employee commits further misconduct.

The types of warnings that may be issued, are:

- a separate/single warning (that may be one of a series of warnings); and
- final warning.

## **7.2 SANCTIONS UNDER PART 7 OF THE *PUBLIC SECTOR ACT 2009***

For employees to whom Part 7 of the PS Act applies, section 55 of the PS Act, entitled 'Disciplinary action' provides:

### **55—Disciplinary action**

(1) *A public sector agency may—*

- (a) *reprimand an employee of the agency; or*
  - (b) *suspend an employee of the agency from duty without remuneration or accrual of leave rights for a specified period,*
- on the ground of the employee's misconduct.*

*Note—*

*Disciplinary action may also take the form of—*

- (a) *reduction of the remuneration level of an employee under section 53; or*
- (b) *termination of an employee's employment under section 54.*

*A public sector agency may, in conjunction with taking disciplinary action—*

- (a) *assign an employee to different duties or to a different place under section 47; or*
  - (b) *transfer an employee to other employment under section 9.*
- (2) *Nothing prevents a public sector agency from taking more than 1 form of disciplinary action against an employee for misconduct.*

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<sup>21</sup> And not covered by another similar legislative regime.

As section 55 indicates, other possible action in response to proven misconduct of employees to whom Part 7 of the PS Act applies (and which may be combined with the options available in section 55 of the PS Act) are:

- a reduction in remuneration level under section 53(1)(d); and/or
- termination of employment under section 54(1)(d) (subject to compliance with section 54(3)<sup>22</sup>).

Further, an employee may be transferred to different duties or a different place or places in combination with a disciplinary sanction(s), pursuant to section 9 of the PS Act.

**Note** that the concept of a warning in response to proven misconduct does not apply to employment under Part 7 of the PS Act. The only options available to respond to proven misconduct for this cohort of employment is those provided in Part 7 as well as possible transfer under section 9 of the PS Act.

### 7.2.1 Reduction in remuneration level

For employees whose employment is covered by Part 7 of the PS Act, section 53 of the PS Act ‘Reduction in remuneration level’ represents another possible sanction for employee misconduct (that may be combined with other options provided<sup>23</sup>). An employee’s remuneration may also be reduced pursuant to this section where they are excess to the requirements of an agency at a higher remuneration level or they lack an essential qualification for performing duties at a higher level or for unsatisfactory performance *per se* or due to medical incapacity.

**Note** reference in section 53 of the PS Act to ‘higher classification level’ means an employee’s substantive classification level.

A decision maker may impose one or more sanctions for proven employee misconduct as well as other possible adverse action i.e. transfer.

It is neither possible or helpful to attempt to stipulate circumstances where it may be appropriate for a decision maker to reduce an employee’s remuneration, either as a standalone measure or in combination with another sanction(s) – for a specified period and when it would be appropriate/defensible to do so *ad infinitum*.

The reduction of an employee’s remuneration level must follow an effective process and be a reasonable and rational response to the employee’s proven misconduct by a decision maker who has taken into account relevant considerations and not taken into account irrelevant considerations.

## 7.3 FORMAT FOR ISSUING A WARNING/REPRIMAND

There is no particular form for a warning or reprimand. Correspondence advising an employee that, as applicable, a decision maker has imposed a reprimand upon them (for employment under Part 7 of the PS Act); or has issued them with a warning will serve as the reprimand or warning. It will lay on the employee’s personal file and traditionally would include a caution of the possibility or more serious consequences in the event of future proven misconduct.

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<sup>22</sup> Where it applies.

<sup>23</sup> The reduction of an employee’s remuneration or a fine is possible in respect of employment governed by certain other public sector legislation.

## **7.4 MANAGERIAL CAUTION (RESPONDING ADMINISTRATIVELY TO PROVEN MISCONDUCT)**

In some circumstances, a decision maker may find allegations of misconduct against an employee proven, but exercise their discretion not to impose a disciplinary sanction(s) upon the employee (or, as applicable, take other disciplinary or adverse action). In such circumstances, the decision maker may – and usually should – caution or counsel the relevant employee in relation to the proven misconduct. Managerial counselling or a managerial caution is not a sanction/disciplinary action. Rather, it is the exercise of discretion not to impose a sanction/take disciplinary action. It may be accompanied by a managerial direction(s) to an employee to undergo particular training or education or similar.

## **7.5 TRANSFER TO DIFFERENT DUTIES OR LOCATIONS**

Following or during a disciplinary process or the management of unsatisfactory performance, a decision maker may form the view that it is untenable for an employee to remain in their current duties or work location.

Accordingly, a chief executive, agency head or delegate may propose that an employee be transferred to alternative public sector employment under section 9 of the PS Act<sup>24</sup>.

An employee must be afforded procedural fairness in respect of any intended decision to transfer them to alternative duties in the relevant circumstances. That is, they must be put on notice as to the intent to transfer them and the reasons therefore and provided with a reasonable opportunity to respond as to why this should not occur. A chief executive/agency head or delegate must objectively consider any submission from an employee prior to formally deciding to transfer or assign them to alternative duties.

## **7.6 TERMINATION OF EMPLOYEMENT**

Termination of employment is clearly the most serious disciplinary sanction or action available to an employer (in the public sector, this means an employing authority on behalf of the Crown). This option is only appropriate in circumstances where by way of the misconduct or other unsatisfactory performance, an employee has displayed an intent no longer to be bound by the terms and conditions of their contract of employment; and only following a thorough process where the employee is afforded procedural fairness.

It is recommended that formal assistance and advice be sought from a Human Resources officer when the circumstances are such that termination of an employee's employment is a possible outcome from a relevant process; or a decision maker is considering terminating an employee's employment. Decision makers and those assisting them should consider if they would be aided by legal advice and if so, whether it is prudent that such advice be sought at the earliest possible opportunity.

### **7.6.1 Termination of employment under Part 7 of the PS Act**

For employment to which Part 7 of the PS Act applies, section 54 of the PS Act is entitled 'Termination' and contains the grounds an employee's employment may be terminated on account of. This includes misconduct and unsatisfactory performance *per se* and unsatisfactory performance caused by mental or physical incapacity. It also includes when an employee is excess to the requirements of an agency or where an employee lacks an essential qualification for performing their duties.

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<sup>24</sup> Where an employee's employment is covered by Part 7 of the PS Act (either directly or by Regulation) an assignment of duties can occur under section 47 of the PS Act.

Section 54 states:

### **54—Termination**

(1) *A public sector agency may terminate the employment of an employee of the agency on any of the following grounds:*

- (a) *the employee is excess to the requirements of the agency;*
- (b) *the employee's physical or mental incapacity to perform his or her duties satisfactorily;*
- (c) *the employee's unsatisfactory performance of his or her duties;*
- (d) *the employee's misconduct;*
- (e) *the employee's lack of an essential qualification for performing his or her duties.*

(2) *The employment of an employee may not be terminated under subsection (1)(a) or (b) unless the public sector agency has made reasonable endeavours to find, but has failed to find, other suitable duties in the agency, or other public sector employment (to which this Part applies), to which the employee might be assigned or transferred on conditions that maintain the employee's substantive remuneration level.*

(3) *A public sector agency may not terminate the employment of an employee under subsection (1) on any ground unless the agency—*

- (a) *has informed the Commissioner of the grounds on which it is proposed to terminate the employment of the employee and the processes leading up to the proposal to terminate; and*
- (b) *has considered any advice given by the Commissioner within 14 days about the adequacy of the processes.*

For employment covered by Part 7 of the PS Act and where the application of the provision has not been excluded by regulation, under section 54(3) of the PS Act, where an agency (decision maker) is proposing to terminate the employment of an employee, for any reason listed in section 54(1), they must inform the CPSE of the grounds on which it is proposed to terminate the employee's employment and the processes leading up to the proposed termination. The agency must then consider any advice given by the CPSE about the adequacy of the processes within 14 days.

Agencies are not bound to follow the advice of the CPSE but it would not be prudent for them to do so where the CPSE advises that the processes followed are inadequate. Advice provided by the CPSE will be discoverable and may be later produced in the South Australian Employment Tribunal or a Court if an unfair dismissal application is lodged or other proceedings are initiated.

Decision makers and those assisting them and/or the CPSE may seek legal advice from the Crown Solicitor's Office *vis-à-vis* a proposal to terminate a person's employment. This advice will be subject to legal professional privilege and is to be managed in a manner that maintains such privilege. This extends to not quoting from or paraphrasing the advice in briefings to decision makers or correspondence to employees or their representatives. Sometimes it is obvious that legal advice is required in light of the relative complexity of a matter and sometimes it is a prudent exercise of discretion to seek advice in light of factors such as the clear interest in maintaining the confidentiality about/the inherent sensitivity attached to a matter.

### 7.6.2 Abandonment of employment/determination of resignation (PS Act)

Abandonment of employment is termination of a contract of employment at the initiative of the employee and occurs when an employee has been absent from the workplace without a reasonable excuse, and/or without approval and in the circumstances indicate that they have abandoned their employment.

For non-executive employment covered by Part 7 of the PS Act, section 52(2) of the PS Act empowers a chief executive/agency head or delegate to determine that a non-executive employee has resigned from their employment.

A chief executive, agency head or delegate must make all reasonable efforts to afford an employee procedural fairness before declaring that their employment has ended through abandonment of it by them (or for non-executive Part 7 employment, they are declared as having resigned), i.e. put the employee on notice as to the intention to do so and provide them with a reasonable opportunity to submit as to why he/she should not act as intended. This includes ensuring that correspondence is delivered to their last known home address.

It is not necessary that a written explanation in respect of an absence from duty be provided personally by the employee. It might be appropriate in some circumstances, for example, for the employee's spouse or a member of their family to provide the explanation. It is important that any explanation provided is proper - both in terms of form and substance.

If no submission is received from an employee or any submission received does not persuade the decision maker to change their intended course of action, they may formally decide that the employee is taken to have resigned from their employment and advise (or at least reasonably attempt to advise) them accordingly.

Sometimes an employee who has been absent without authority (including for ten days or more) and has not provided written explanation for the absence will attend their workplace intending to perform duties. If a decision maker is contemplating an assertion of abandonment of employment by the employee/reliance on section 52 of the PS Act is being considered, management must not permit the employee to commence work and direct them to remain absent until further notice.

Although it will be possible to discipline the employee based on their conduct, the decision maker will not be able to viably assert they have abandoned their employment/rely on section 52 of the PS Act if they permit them to recommence work.

### 7.6.3 Frustration of contract of employment

**Illness, injury or incapacity:** the most common way a contract of employment is ended by way of the operation of the doctrine of frustration of contract is prolonged, indefinite absence from the workplace due to non-work related/compensable illness, injury or incapacity of an employee. If there is a reasonable likelihood that the employee will be able to return to work in a fit state to perform all of the inherent requirements of their role within a reasonable period, there must be consideration of whether it is appropriate to provide the employee with leave without pay or to consider the contract of employment ended by frustration. What is considered a reasonable period depends on the particular circumstances and relevant considerations.

**Loss of an essential qualification:** employees in a number of occupational groups are required to be registered with a board or other authority in order to lawfully perform the duties of their role or to maintain a particular qualification in order to perform their duties. Such a requirement is in addition to any other qualification considered essential for a role. If, for example, an employee's professional registration is cancelled, suspended or not renewed, the employee is no longer able to meet an essential term of the contract of employment.

In instances where there is merely a failure by an employee to renew professional registration by the required date, the employee should be given an opportunity to renew the registration. The employee should be treated as being on leave without pay until such time as he or she is able to demonstrate that their registration has been renewed. The employee may be allowed to utilise accrued recreation or long service leave in circumstances considered appropriate by the decision maker.

If an employee does not renew their professional registration after a reasonable opportunity has been given – it is likely their contract will have ended by way of frustration. In circumstances where an employee has, on the face of it, taken an undue time to renew professional registration or similar and it is considered their employment has not been ended by operation of the doctrine of frustration of contract, they may be liable to disciplinary action for misconduct.

Should an employee's professional registration be cancelled or suspended, it is likely there will be a basis to conclude that their contract of employment will be considered as having been ended due to the operation of the doctrine of frustration of contract. A contract of employment may similarly be ended by the operation of the doctrine of frustration of contract where the employee loses other essential qualifications, such as a licence to drive a motor vehicle.

**Imprisonment:** If an employee is sentenced to a term of imprisonment or remanded in custody, an employee's contract of employment is almost inevitably ended by them deeming to have resigned or the operation of the doctrine of frustration of contract.

Decision makers and/or those assisting them should consider seeking legal advice from the Crown Solicitor's Office in circumstances where a decision maker is contemplating the assertion that a contract of employment has ended by way of deemed resignation by an employee or the operation of the doctrine of frustration of contract.

## 8 REPORTABLE CONDUCT

### 8.1 REPORTING TO THE COMMISSIONER FOR PUBLIC SECTOR EMPLOYMENT

The occurrence, duration and outcome of disciplinary processes must be reported to the CPSE annually via the State of the Sector survey.

Chief executives, agency heads or delegates are also required to notify the CPSE on an annual basis, as part of the State of the Sector survey, instances where completion of disciplinary processes within the aspirational six month period did not occur/was not possible. Notification is to include:

- the applicable legislative employment regime (i.e. does Part 7 of the PS Act apply to the relevant employment?);
- the date the disciplinary process commenced;
- the reason(s) why the disciplinary process was not completed within the nominal timeframe/it was not possible to complete; and
- any agency-level measures put in place in an effort to expedite relevant processes.

The information to be collected will be subjected to qualitative analysis and will assist the CPSE to determine future policy responses.

## **8.2 INDEPENDENT COMMISSIONER AGAINST CORRUPTION AND OFFICE FOR PUBLIC INTEGRITY**

All public sector employees and other public officers need to be aware of their personal obligations under the Directions and Guidelines issued under the *Independent Commissioner Against Corruption Act 2012* to report relevant matters to the Office for Public Integrity (and, as relevant, other appropriate authority/ies). Further information can be found at <https://icac.sa.gov.au/opi>.

## **8.3 CODE OF ETHICS FOR THE SOUTH AUSTRALIAN PUBLIC SECTOR**

The Code of Ethics imposes obligations on all public sector employees, as follows:

*Public sector employees will report to an appropriate authority workplace behaviour that a reasonable person would suspect violates any law, is a danger to public health or safety or to the environment, or amounts to misconduct. This obligation does not derogate from the obligations on public sector employees under the Directions and Guidelines issued by the Independent Commissioner Against Corruption.*

## **8.4 INTERACTION BETWEEN DISCIPLINARY AND CRIMINAL PROCESSES**

Disciplinary and criminal proceedings may be related to the same set of facts, but the relevant processes are separate and distinct (albeit, related). Where an employee has also been charged with a criminal offence, a decision maker and those assisting them must continue to investigate and/or otherwise deal with incidents of suspected, alleged or proven misconduct where this is possible in the circumstances<sup>25</sup>. This includes finalising disciplinary investigations and other processes whilst criminal investigations/proceedings are unresolved, where possible. It may be prudent for a decision maker to seek specialist Human Resources and/or legal advice in relevant circumstances.

Whether it is appropriate, practical or even possible to conduct a disciplinary investigation and/or other process relating to suspended, alleged or proven misconduct pending or concurrent with a criminal process will depend on the facts and circumstances of the matter and, in particular, the alleged conduct of the employee.

Some suspected conduct will not be beneficial to a separate disciplinary investigation and the chief executive, agency head or delegate will need to await the outcome of the criminal investigation and any other process arising. Decision makers and those assisting them, including lay investigators should liaise closely with the South Australia Police or another appropriate law enforcement agency if concurrent criminal and employment investigations are contemplated to ensure they be conducted in a coordinated manner.

An employee may still commit misconduct and be sanctioned/disciplined in respect of such misconduct even if a law enforcement agency declines to proceed with an investigation or to initiate or continue a prosecution; and even where this has occurred and the employee was acquitted of related criminal charges. Criminal charges must be proven beyond a reasonable doubt whereas an administrative decision maker must be satisfied an employee has committed misconduct on the balance of probabilities.

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<sup>25</sup> In some circumstances evidence in respect of suspected or alleged employee conduct is not available until the culmination of criminal processes or a decision maker is subject to a direction by the Independent Commissioner Against Corruption that prohibits any progress of the administrative process to be undertaken by an agency.

## 9 REVIEW OF EMPLOYMENT DECISIONS

A public sector employee who has had their employment terminated and who:

- a) believes that the termination was harsh, unjust or unreasonable; and
- b) does not have relevant rights per specific legislation; and
- c) are not otherwise excluded from the relevant jurisdiction;

may apply for relief to the South Australian Employment Tribunal (“SAET”) pursuant to section 106 of the *Fair Work Act 1994 (SA)*.

Employees employed in SA Water and the Rail Commissioner are in the Federal industrial relations jurisdiction and thus *the Fair Work Act 2009 (Cth)* applies to them.

An application to review the termination of employment will be subject to the criteria that is detailed in the relevant legislation. This Guideline does not provide advice on the processes of these tribunals.

Formal assistance and advice should be sought from Human Resources or legal advice if considered relevant in the circumstances.

### 9.1 EMPLOYMENT COVERED BY PART 7 OF THE PS ACT

Section 62 of the PS Act provides employees whose employment is covered by Part 7 of the PS Act with a right to apply to the SAET for external review of a reviewable employment decision, including a prescribed decision. Note that this right applies after an internal review under section 61 has occurred or otherwise in limited circumstances.

The SAET has different powers depending on whether the decision under external review is a prescribed decision or not. The SAET may:

- affirm a decision (any reviewable decision);
- remit matters to the agency for consideration or further consideration in accordance with any directions or recommendations (any reviewable decision); or
- rescind the decision and substitute a decision with one it considers appropriate, including restoring any entitlements lost by the employee (a prescribed decision).

## 10 TIMELINESS AND REPORTING

It is imperative that managers, in particular decision makers, address suspected misconduct (and indeed other unsatisfactory performance) on the part of employees in a timely manner. Industrial tribunals have made it clear that they expect disciplinary processes to be conducted as expeditiously as possible and that this is particularly so when employees have been suspended from duty or subject to directions to remain absent. A failure by decision makers/agencies to conduct expeditious processes can lead to arguments by or on behalf of employees that their improper conduct has been condoned. It can also lead to findings by a tribunal that there was procedural and/or substantive unfairness in the process and/or to successful claims by employees (i.e. workers compensation).

It is recognised that there are a variety of complicating factors that can inescapably extend a disciplinary or similar process, including, but not limited to:

- a related criminal investigation or other processes relating to criminal allegations (but see also below); and/or
- the involvement of other Government agencies including but not limited to orders by a relevant authority prohibiting progress of a process; and/or
- delays in obtaining necessary information that are reasonably out of the control of the decision maker or those assisting the decision maker, such as information from another/other Government agencies; and/or
- matters involving particular factual complexity and/ or collection and consideration of voluminous evidentiary material; and/or
- the fact that a key witness(es) or the employee suspected of misconduct is unavailable to assist or respond due to ill health for a period.

Even where complicating factors of the type outlined above exist in a matter, decision makers and officers should seek to expedite processes in so far as is reasonably possible. The delegation by chief executives and agency heads of decision making power in respect of alleged employee misconduct (and other unsatisfactory performance); and the use of condensed disciplinary processes where possible/appropriate are measures that should assist agencies to this end.

As part of reporting to in respect of the State of the Sector Report, agencies will be required to report on the duration of disciplinary processes relating to employees in the agency and in addition, will be asked to provide reasons for delays in particular matters (refer to Section 8.1 for additional information).

## 11 STORAGE AND RECORDS MANAGEMENT

Records pertaining to the management of unsatisfactory performance, including misconduct, are to be retained and otherwise managed in accordance with the *State Records Act 1997* and the destruction schedules issued under that Act. Please refer to the following link for further information <http://www.archives.sa.gov.au/management/guidelines.html>, or seek advice from State Records SA.

Personal information is also to be managed in accordance with the Cabinet Administrative Instruction 1/89, also known as the Information Privacy Principles. See in particular clause 8 of the Principles, in respect of the use of personal information and in particular, sharing of it with third parties (including other Government agencies).

## 12 SEEKING TO ENSURE GOOD PRACTICE

### 12.1 PLANNING AND PREPARATION

The processes following investigation will be inadequate if the scope of an investigation is not appropriate/sufficiently broad.

Lack of planning, preparation and forethought on the part of an investigator/officer conducting an investigation and/or those otherwise assisting a decision maker; can, for example, result in failure to obtain necessary or relevant evidence or other material. This includes the competency of the investigator or the officer undertaking the investigation.

Allocation of resources can hamper or delay an investigation or other processes or seriously compromise their effectiveness; as can a lack of competency on the part of a decision maker and/or those assisting the decision maker.

As many of the administrative processes associated with an investigation are inherently time consuming, the risk is increased where the investigating officer has other competing duties. If sufficient time is not made available to conduct an effective investigation and/or conduct other relevant processes, there will be a risk that a court or tribunal will find the matter is affected by procedural and/or substantive flaws and of successful workers compensation claims by employees.

## 12.2 PROCEDURE

The following common mistakes can result in want of procedural fairness:

- failure to effectively communicate all allegations to the employee or to articulate them in a proper, thorough manner;
- failure to provide to the employee copies of or access to all relevant evidence and other material relied upon by the decision maker;
- failure to notify the employee if the suspicions and thus allegations as to their conduct change from initial suspicions/allegations through the course of or following an investigation; and
- failure to collect sufficient evidence and/or to identify the most compelling evidence (for example, where not all necessary witnesses were interviewed to obtain the best evidence available, due to being unavailable or unwilling to be interviewed).

Any evidence or information which casts doubt on the truth and accuracy of suspicions or allegations of misconduct by an employee; or which are genuinely in mitigation of proven misconduct; must be carefully, objectively and personally considered by the decision maker.

Adequate collection and careful consideration of evidence and other relevant considerations must form the basis for any findings of fact (and action based on such findings). A finding insufficiently supported by evidence and/or other relevant considerations cannot properly be made on the balance of probabilities and if so made, will represent a breach of the rules of procedural fairness.

It is important to have an adequate understanding of the particular workplace environment and organisational culture when considering a matter. A decision may appear unreasonable or even wrong when considered out of context, but may be defensible when considered in context.

Lack of objectivity such as bias, actual, perceived, or potential must be avoided. Conclusions should not be reached without supporting evidence. A 'feeling' or 'hunch' about a matter, without evidence, should not be relied upon in any way when forming an opinion or conclusion on a matter.

A person conducting an investigation or otherwise assisting a decision maker, as well as the decision maker, must have knowledge of applicable legislation, legal principles, policies and procedures relevant to the disciplinary process, as well as some knowledge of industry practice and protocols with regard to investigative procedures.

Care should be taken to prepare and securely store documentation relating to disciplinary processes.

It is the role of the decision maker – and only the decision maker - to make findings of fact and where allegations are found as proven, to decide upon and affect disciplinary sanction(s)/action and/or other adverse action. Investigators and others assisting a decision maker may advise a decision maker as to what findings/decisions they believe are reasonably open to them but are not to purport to make findings/relevant decisions; nor to make statements that are tantamount to the making of findings.

## **13 ATTACHMENTS**

### **13.1 FLOW CHART: TYPICAL, UNCOMPLICATED MISCONDUCT PROCESSES**

#### **13.2 SAMPLE CORRESPONDENCE**

- A. Notifying of intent to suspend from duty without remuneration and managerial directions
- B. Combining allegations of misconduct – opportunity to respond – and notice of probable disciplinary sanctions in event allegations found proven – opportunity to respond - managerial directions
- C. Notifying of findings of fact and intended disciplinary sanctions – managerial directions
- D. Notifying of findings of fact and notice of decision as to imposition of disciplinary sanctions – managerial directions [relevant to correspondence putting allegations of misconduct and notifying of probable sanctions if allegations found proven]
- E. Imposition of disciplinary sanctions – managerial directions
- F. Notifying of intent to suspend from duty without remuneration and managerial directions
- G. Notifying suspension from duty without remuneration and managerial directions