

# Human Resources

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



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# GUIDELINES FOR MANAGING COMPLAINTS, MISCONDUCT AND UNSATISFACTORY PERFORMANCE

CONTENTS	PAGE
Part 1 General Principles Applicable to Managing Complaints, Unsatisfactory Performance and Misconduct for Teaching Service Employees	4
Part 2 Guidelines for Managing Complaints against Employees	14
Part 3 Guidelines for Managing Misconduct in the Teaching Service Under Division 10 of Part 2.4 of the Education and Training Reform Act 2006	24
Part 4 Guidelines for Managing Unsatisfactory Performance in the Teaching Service Under Division 9A of Part 2.4 of the Education and Training Reform Act 2006	31
Part 5 Appeals, Reviews and Notifications to the Victorian Institute of Teaching (VIT)	39
Further assistance and advice	40

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

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### Overview

Every day, principals/managers may deal with a range of challenges such as workplace conflict, parent and community member concerns, staff and student grievances, and policy issues. These matters are dealt with in accordance with the needs and requirements of the particular school community or workplace, taking into account Department of Education and Training (“Department”) policy and best practice. The Guidelines are intended to assist with complaints against employees and unsatisfactory performance and misconduct involving employees. They are not intended to regulate the day-to-day management of ordinary workplace issues and challenges.

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

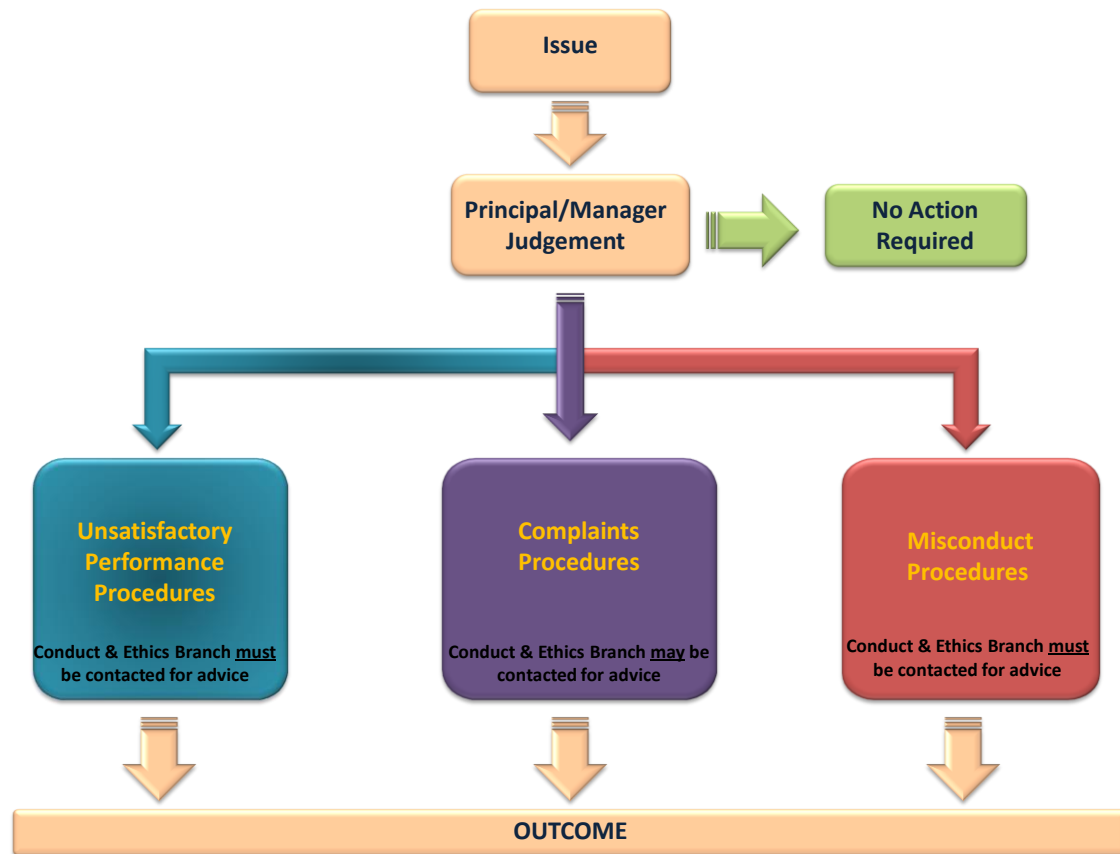
A positive workplace climate, including recognition that misconduct and unsatisfactory performance will be dealt with promptly and fairly and within the context of an improvement - focussed set of procedures, is an integral component of a healthy, successful and fulfilling working environment.

The quality of the workforce in schools is directly proportional to the quality of the education provided to students. A culture that promotes high standards of conduct and encourages performance improvement in school education is critical.

The *Victorian Government Schools Agreement 2013* details a process for managing unsatisfactory performance for employees in the teaching service. The unsatisfactory performance procedures in these Guidelines are consistent with the Agreement. They do not apply to casual employees, school council employees or employees subject to probation.

## Which process should be used?

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



In determining the appropriate action, the principal/manager, subject to satisfying any legal or policy requirements, should use his or her professional judgement to decide whether the matter should be dealt with under the Guidelines and if so, whether it should proceed under the complaints, unsatisfactory performance or misconduct procedures.

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

An employee who is the subject of a complaint, unsatisfactory performance or misconduct process may contact the Branch who will provide the employee with information regarding the process but it is not the role of the Branch to provide support and assistance to employees subject to a particular procedure.

The **complaints** process should be used for dealing with incidents such as those described in Part 2 of the Guidelines. The **unsatisfactory performance** procedure set out in Part 4 of the Guidelines should be used in relation to unsatisfactory performance.

Unsatisfactory performance may ultimately lead to action by the Secretary<sup>1</sup> under the *Education and Training Reform Act 2006*. The **misconduct** procedure set out in Part 3 of the Guidelines is to be applied to an employee who is alleged to have engaged in conduct of a serious nature warranting action by the Secretary under the *Education and Training Reform Act 2006*.

**Where the matter involves the implementation of the procedures for unsatisfactory performance or misconduct, including sexual harassment, the Conduct & Ethics Branch must be contacted for advice regarding the appropriate course of action.**

The principal/manager is expected to have a note-taker present at all meetings conducted in accordance with the Guidelines.

In these Guidelines, a reference to a manager may include a reference to a Regional Director in respect of unsatisfactory performance, misconduct and complaints against a principal. A reference to the Secretary may include a reference to the Secretary's delegate. A reference to a principal/manager may also include a reference to an investigator where one has been appointed.

## Fairness for all

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

- the right of an employee to know the allegation(s) being made against him or her
- the right of each party to be heard with respect to the allegations
- the right of each party to be treated fairly
- the right of the employee to have a support person present during meetings (the role of the support person/representative is set out in these Guidelines)
- the right of each party to a decision-maker who acts fairly and in good faith.

Consistent with the *Fair Work Act 2009*, these Guidelines have been developed to ensure that the principle of a “fair go all round” is accorded to all parties. That is, the principles of procedural and substantive fairness underpin any investigation or inquiry into an employee's performance or conduct.

An inadvertent failure by a principal/manager to apply any of the steps in the Guidelines does not make an action or decision defective, as long as the action, investigation or decision is fair and reasonable overall.

The implementation of the Guidelines:

- supports the education and welfare of students ensuring appropriate duty of care is maintained
- reinforces that the Department will consider all matters seriously

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<sup>1</sup> The powers to commence an inquiry and take action under Division 10, Part 2.4 of the Act, are vested in the Secretary but in most cases would be exercised by a delegate such as the Regional Director.

- ensures that all matters are dealt with in a fair and consistent manner
- highlights occurrences of unacceptable and inappropriate behaviour and the need for preventative strategies in particular areas
- meets the Department's legal obligation to take all 'reasonable precautions' to prevent discrimination and sexual harassment
- reduces the risk of the Department, the school council or other parties being held vicariously liable for the actions of individuals that contravene anti-discrimination legislation
- prevents the unnecessary escalation of the situation
- ensures the provision of natural justice to all parties, as appropriate, and
- should occur in a timely manner.

## Public sector values and employment principles

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

## Public sector values

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

Public officials should:

### **a. Responsiveness**

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

### **b. Integrity**

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

**c. *Impartiality***

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

**d. *Accountability***

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

**e. *Respect***

- treat others fairly and objectively
- ensure freedom from discrimination, harassment and bullying
- use their views to improve outcomes on an ongoing basis

**f. *Leadership***

- demonstrate leadership by actively implementing, promoting and supporting these values

**g. *Human rights***

- make decisions and provide advice consistent with the human rights set out in the *Charter of Human Rights and Responsibilities Act 2006*
- actively implement, promote and support human rights.

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

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

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

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



## Employment principles

Under section 8 of the [Public Administration Act 2004](#), the Secretary must establish employment processes that ensure that:

- employment decisions are based on merit
- public sector employees are treated fairly and reasonably
- equal employment opportunity is provided
- human rights as set out in the [Charter of Human Rights and Responsibilities Act 2006](#) are upheld
- public sector employees have a reasonable avenue of redress against unfair or unreasonable treatment.

## Role of support person or representative during meetings

An employee who is the subject of a complaint, unsatisfactory performance or misconduct process has the right to have a support person/representative present at meetings with their principal/manager in matters arising under the Guidelines.

It is the principal/manager's responsibility to advise the employee of the right to a support person or representative.

A support person/representative may be a friend, colleague, relative or union/association representative. The role of the support person/representative is to provide professional and moral support to the employee concerned. He or she also acts as a witness or observer to the process. The role is one of support where meetings are preliminary to the commencement of formal procedures or where relevant information is being gathered to determine if formal procedures are warranted. Where formal procedures are commencing the employee has a right to advocacy.

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

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

Direct discussions between a principal/manager and an employee during meetings are encouraged and can assist in maintaining a constructive working relationship both during and following the completion of the process.

If the employee chooses not to answer any questions during a meeting, the principal/manager may proceed with the process in the absence of any response from the employee.

During a meeting, if the support person/representative wishes to provide advice in private to the employee, the meeting should be temporarily adjourned to allow this to

happen. If unreasonable behaviour disrupts the meeting consideration should be given to an adjournment.

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

## Confidentiality

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

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

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

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

The principal/manager must ensure that they observe appropriate confidentiality in relation to the management of any complaint, unsatisfactory performance or misconduct procedure. The principal/manager must advise all witnesses of their obligation to keep details of the investigation confidential and respect the confidentiality rights of the employee or complainant involved. However, in order to conduct a thorough investigation, it may be necessary for the principal/manager to disclose certain information to other persons involved in the investigation or management of the matter.

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

## Witnesses

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

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

## Defamation

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

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

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

## Protection from victimisation

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

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

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

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

## Complainant protection

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

The [Making And Handling Protected Disclosures Guidelines](#) provide further information about making a protected disclosure.

## Vexatious complaints

Some complaints may be determined to be vexatious or malicious in nature. Where the principal/manager determines after due consideration that this is the case, the complaint should be dismissed and the complainant counselled about his or her action in lodging a complaint. Making a vexatious or malicious complaint may be an act of misconduct in itself.

## Documentation

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

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

Employees are entitled to inspect their personnel file at any time. Inspection should occur in the presence of a suitable witness.

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

Application may be made under the *Freedom of Information Act 1982* or *Information Privacy Act 2000* for copies of the documents relating to any of the processes outlined in the Guidelines. If this occurs, the Department's Information Management Unit will make a determination as to what documents may be released.

For further information in relation to accessing personnel files in schools, see [Records Management](#).

## Removal from duty

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

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

An employee may be reassigned duties or suspended from duty with or without pay. A reassignment of an employee's duties still enables the employee to work but may remove the employee from working with a complainant or being in a position to tamper with the evidence. A suspension from duties involves the employee being suspended from the workplace and does not enable the employee to continue working.

A person taking the action of reassigning duties or suspending an employee must have the delegated authority to do so and must comply with the law. A reassignment of duties or a suspension taken in connection with a process in these Guidelines must not occur without consultation with the Conduct & Ethics Branch. The Branch will advise on the correct process to be followed.

Principals/managers must not be seen to prejudge the finding as to whether the allegations are substantiated. Reassignment of duties and suspension from duty are not sanctions and should not be used as a penalty.

The employee's welfare and reputation are to be considered before a decision to reassign or suspend is made particularly where no findings of wrong-doing have yet been made.

### Introduction

A positive working environment is an integral component of a healthy, successful and fulfilling working environment. Every day, principals/managers may deal with a range of challenges including workplace conflict, general parent and community member concerns, staff and student grievances, and policy issues. These matters should be handled in accordance with the needs and requirements of the particular school community and workplace, taking into account Department policy and best practice. The complaints processes are not intended to regulate the day-to-day management of ordinary workplace issues and challenges. Rather, they are to be used for dealing with complaints against employees or conduct which has come to the attention of the manager or principal which ought to be dealt with as a complaint.

Complaints against an employee may arise from:

- unprofessional conduct and/or unsatisfactory performance
- allegations of aggressive, demeaning or uncooperative behaviour
- a particular incident
- allegations of unlawful discrimination (for example, discrimination on the ground of a protected attribute such as race, religious belief, disability, sexual orientation, gender, family responsibilities) or racial or religious vilification
- allegations of unlawful harassment, including sexual harassment
- allegations of bullying, as defined by the Victorian WorkCover Authority
- decisions made, or not made, by the principal/manager that a complainant believes are unfair, unreasonable or inappropriate.

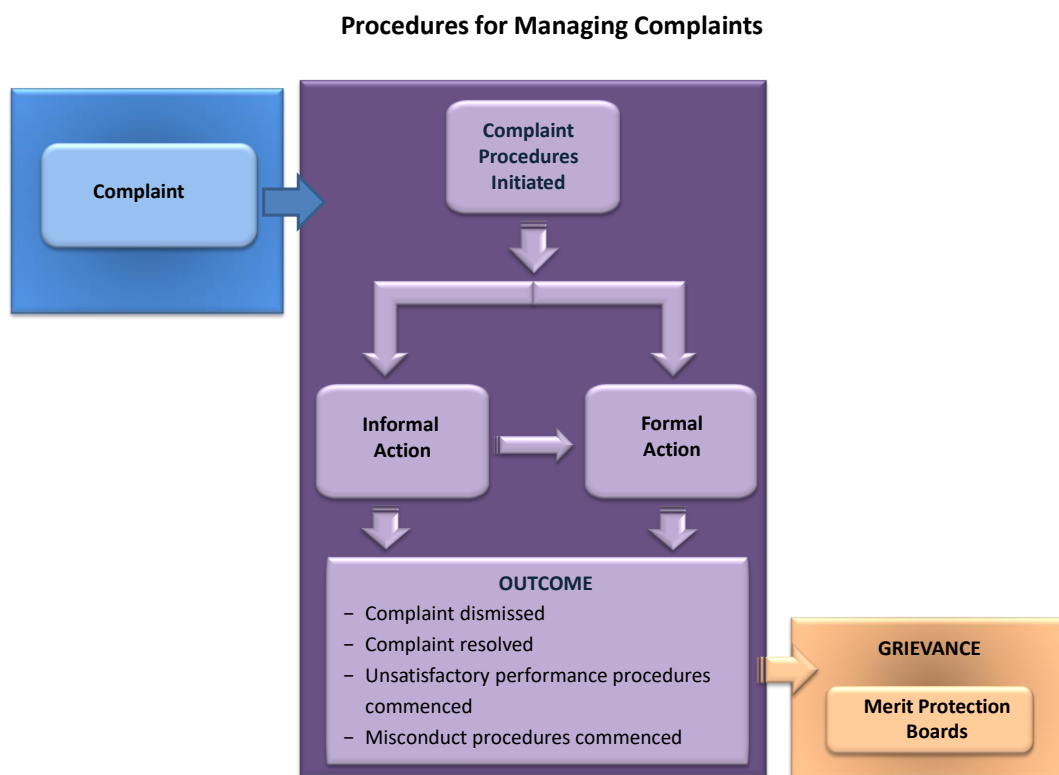
The principal/manager must ensure that a complaint is dealt with in a way that is both procedurally and substantively fair.

It is important that all steps in the complaints process are documented.

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

## Complaints resolution process

The complaints resolution process provides a framework for the resolution of complaints against employees. Complaints against employees should be dealt with promptly using a complaints resolution procedure as outlined below:



The complaints resolution process encompasses both informal and formal action.

Upon receiving a complaint the principal/manager will assess the nature of the complaint and form a view regarding the appropriate course of action. In exceptional circumstances, it is open to a principal/manager to decline to accept a complaint where he or she is satisfied the complaint is clearly without merit, vexatious or malicious. In such a case, the principal/manager should give the complainant his or her reasons in writing.

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

Many concerns expressed to the principal/manager by parents, students, employees or members of the community are most appropriately dealt with at an informal level.

## Informal action

The principal/manager may decide to respond to a complaint through informal action where:

- a complaint is of a minor nature
- the complainant wishes the matter dealt with informally and the principal/manager considers this appropriate in the circumstances
- a complaint has arisen from lack of, or unclear, communication.

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

Documentation associated with informal action could be a diary entry and/or retention of a copy of any response provided to the complainant. However, documentation should be sufficiently detailed to provide a record of the action taken in the management of the complaint. Providing a written response to the complainant outlining the action taken is advisable. At any point where the principal/manager considers it appropriate, formal action may be commenced, particularly where informal action has been unsuccessful or new information is received.

## Conflict Resolution

The Department's Conflict Resolution Support Service is available to assist all employees in addressing workplace conflict. This service can provide the following:

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

Prior to determining whether to commence a formal complaint process, and where the parties agree to participate, the principal/manager may choose to use one of the Conflict Resolution Support Services such as mediation, where the nature of the complaint lends itself to being resolved by informal means.

### Mediation

In some matters mediation may assist the parties to resolve the complaint unless the conduct complained of concerns inappropriate conduct such as sexual harassment.

It is important not to expose the complainant to a repeat of the alleged behaviour. The principal/manager must ensure that the conduct of a participant in mediation is



appropriate and professional at all times. It is important that all parties understand that mediation is not mandatory and there will be no adverse consequences as a result of non-participation.

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

The following principles apply to any mediation process:

- encouraging willingness in parties to acknowledge circumstances and develop solutions
- identifying and working from areas of common understanding
- identifying scenarios and alternative responses and behaviours
- offering counselling or other forms of welfare support (see below)
- ensuring an effective mechanism for communication where there is difficulty with interpersonal relationships.

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

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

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

## Employee Assistance Program

The Employee Assistance Program is a free, short term, solution focused and strictly confidential counselling service of up to four sessions. The Employee Assistance Program is for Department employees to discuss any personal or work related issues such as anxiety and stress, conflict and communication, or performance issues. This program also provides a dedicated Manager Assist telephone advisory service to support principals and managers in leadership positions to access management support and coaching. The Employee Assistance Program may be contacted on 1300 361 008.

## Procedures where allegations of sexual harassment are made

Allegations of sexual harassment must be treated seriously and in most cases formal action is necessary.

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

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

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

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

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

### *Further action available to principal/manager*

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

- reiterate to the whole workplace that sexual harassment is unacceptable and will not be tolerated
- promote the Department's Sexual Harassment Policy and the avenues for seeking advice and making complaints
- monitor the whole workplace to ensure that acceptable standards of conduct are maintained in the workplace
- ensure compliance as far as practicable with the items listed in the "Responsibilities" section of the Sexual Harassment Policy

- ensure that the alleged harasser is aware of and understands the Sexual Harassment Policy (this may involve speaking directly to the respondent about the allegations)
- take any other appropriate action.

It is advisable to provide the complainant/s with a written response outlining the action taken and the outcome. Documentation regarding the sexual harassment complaints should be sufficiently detailed to provide a record of the action taken in the management of the complaint. Where informal action is inappropriate, unsuccessful, the principal/manager will consider implementing formal action (as below), or commencing a misconduct inquiry or unsatisfactory performance procedure.

## Formal action

Some matters raised directly with the principal/manager or otherwise brought to the principal's attention may warrant the use of formal action. The Conduct & Ethics Branch may be contacted for advice and support in the implementation of any formal action.

Formal action comprises:

- Step 1 Investigating the complaint
- Step 2 Making a finding
- Step 3 Determining appropriate action

### *Step 1 Investigating the complaint*

Commencement of a formal complaints resolution process requires the principal/manager to investigate the complaint to determine whether or not it has substance.

An investigation may involve:

- Establishing the precise nature of the complaint. This may involve making a written record of the verbal complaint, interviewing the complainant and requesting that the complaint be put in writing (where this has not already occurred). The failure of a complainant to put the complaint in writing does not mean the complaint should not be investigated. Where the complainant advises the principal/manager they wish to remain anonymous, the principal/manager needs to establish why the complainant does not want their identity disclosed. In this respect, the principal/manager will need to manage the concerns of the complainant. In most cases, it is not possible for the complainant to remain anonymous due to the right of the respondent to natural justice and to know the allegation(s) being made against him or her. Whilst the complainant's wishes should be taken into account, they do not determine whether or how the complaint should be investigated. That is the responsibility of the principal/manager.

- Where a complaint has been received in writing, the principal/manager should acknowledge receipt of the complaint in writing.
- Providing the employee with the details of the complaint in writing and an opportunity to respond in writing. It is preferable that the written details of the complaint be provided to the respondent in person. The letter of complaint should include information regarding who made the complaint and when it was received, the specific allegations, and advice to the employee regarding confidentiality.
- Providing the employee with an indicative timeline for the investigation. Where this timeline needs to be varied, the principal/manager should advise the employee.
- Considering other relevant matters to assist in clarifying the complaint. This may involve examining personnel records and other documentation, requesting a written statement from any witnesses or other persons and where necessary, interviewing those people.
- Keeping written accounts of all interviews.
- Providing the opportunity for the respondent to have a support person or representative present during all meetings as part of this process (the role of the support person/representative is defined in Part 1 of these Guidelines).
- If the principal/manager considers it appropriate in the circumstances, providing the opportunity for the employee to meet with the principal/manager in person to clarify matters in the response.
- In some circumstances, the principal/manager may decide it is appropriate to provide evidence obtained in the investigation to the complainant and seek a further submission from them. This may be appropriate where the evidence contradicts their original claims and where the relative merits of the competing claims are not readily discernible, or otherwise in the interests of natural justice.

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

*Note: The principal/manager should give consideration to whether a student's parent(s) or guardian(s) needs to be advised of any interview conducted as part of an investigation into an employee's conduct or performance.*

## *Step 2 Making a finding*

Following the investigation, the principal/manager should determine whether the complaint has substance and make a decision about what action, if any, should be taken. In addition to the information listed in *Step 1*, this assessment should take into consideration:

- Whether the weight and reliability of the evidence demonstrates that the complaint has or has not been substantiated
- The circumstances and context of the complaint
- Whether evidence was presented by the parties and witnesses in a credible and consistent manner
- The absence of evidence where it should logically exist.

The investigation must be sufficiently thorough to allow the principal/manager to arrive at a reasonable state of satisfaction that, on the balance of probabilities, the complaint is or is not substantiated. It may not therefore be necessary to interview every witness to an incident to make a finding about the relevant facts.

Where the evidence appears to demonstrate that the allegations have no substance, the principal/manager may consider providing the complainant with the preliminary findings and seeking a further submission from them. The general principles of natural justice should guide the principal/manager in determining whether this step is warranted in all the circumstances.

The standard of proof is a civil standard of the balance of probabilities – that, on the balance of probabilities, it is more likely than not, that the alleged conduct occurred. The principal, as the investigator, does not have to be satisfied beyond reasonable doubt (which is the criminal burden of proof).

Where there are no independent witnesses to provide evidence, the principal/manager may make a decision based on the credibility of the parties involved. Each case should be assessed on its own particular circumstances. ‘Hearsay’ evidence (that is, evidence provided by a person who did not witness the event or matter in question) may be taken into account, but may be given less weight.

## *Step 3 Determining appropriate action*

Following the investigation the options available to the principal/manager are to find the complaint substantiated or not substantiated.

### Complaint not substantiated

The principal/manager may determine that a complaint is not substantiated and dismiss it. In this case the principal/manager should identify why the complaint is not substantiated and clarify any misunderstandings and deal with any issues. This may involve:

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

### Complaint substantiated

Where the principal/manager determines that a complaint does have substance the principal/manager is to determine the appropriate course of action.

In determining appropriate action, the principal/manager may consider one or more of the following:

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

Where the investigation of the complaint identifies issues in relation to the employee's work performance, the principal/manager may consider managing these through the Performance and Development process or, in more serious cases, implementing unsatisfactory performance procedures in accordance with these Guidelines. Similarly, if the conduct amounts to misconduct, consideration should be given to implementing the misconduct procedures.

A written response outlining the decision and the reasons for it should be provided to the employee. A written response should also be provided to the complainant informing them of the conclusion of the process. Where appropriate, and taking into account privacy considerations, the response should broadly outline the key findings. In some situations, it may not be appropriate to inform the complainant about specific details of the action taken against the employee for reasons of sensitivity or confidentiality.

## Document management

As soon as possible after making and acting on a decision, the principal/manager should attach a copy of all documentation related to the complaints process to the employee's personnel file (refer to Part 1 of these Guidelines for further information).

## Personal grievance or review of action

In accordance with the relevant [Ministerial Order](#), persons employed under Part 2.4 (Teaching Service employees) or Part 2.3 (school council employees) of the *Education and Training Reform Act 2006* have the right to lodge a personal grievance with the [Merit Protection Boards](#) in respect of an action taken within a work location that directly affects an employee. This includes the outcome of a local complaints process. A personal grievance may be lodged by any employee who believes that their rights or legitimate interests have been affected by the outcome of a complaints process; this includes complainants as well as respondents to a process.

Further information in relation to personal grievances is available on HRWeb at [Grievances](#).

Complainants who believe that a complaints process has been improperly managed or has resulted in a manifestly unreasonable outcome may put their concerns in writing to the Regional Director who has direct authority over the principal who made the relevant decision.

## PART 3 GUIDELINES FOR MANAGING MISCONDUCT IN THE TEACHING SERVICE UNDER DIVISION 10 OF PART 2.4 OF THE EDUCATION AND TRAINING REFORM ACT 2006

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### Introduction

Some, but not all, allegations of misconduct will first be handled by the principal/manager at the local level in accordance with the complaints processes in the Guidelines. It is not intended that the misconduct process be used for complaints of a minor nature.

Where the principal/manager has formed a view that there may be grounds for action under Division 10 of Part 2.4 of the *Education and Training Reform Act 2006*, the Conduct & Ethics Branch will, in accordance with the misconduct processes, advise on the next steps.

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

### Grounds for action under Division 10 of Part 2.4

Division 10 of Part 2.4 of the *Education and Training Reform Act 2006* is entitled "Misconduct". Misconduct is one of several grounds upon which the Secretary, after investigation, may take action against an employee under this Division. In many instances, the conduct that constitutes a breach of one of these grounds will also constitute misconduct.

The Secretary, after investigation, may take action under section 2.4.60(1) of Division 10 of the *Education and Training Reform Act 2006* against an employee who—

- (a) conducts himself or herself in a disgraceful, improper or unbecoming manner in an official capacity or otherwise; or
- (b) commits an act of misconduct; or
- (c) during his or her period of service is convicted or found guilty of a criminal offence punishable by imprisonment or a fine; or
- (d) is negligent or incompetent in the discharge of his or her duties; or
- (e) contravenes a provision of this Act or a [Ministerial Order](#) made under Division 10 for the purposes of this Chapter; or
- (f) contravenes a requirement by or under any Act that corporal punishment not be administered to any Government school student; or
- (g) without reasonable excuse, contravenes or fails to comply with a lawful direction given to the employee by a person with authority to give the direction; or



- (h) without permission and without reasonable excuse, is absent from his or her duties; or
- (i) is unfit on account of character or conduct to discharge his or her duties.

In considering the fitness of an employee to discharge his or her duties, consideration may be given to any relevant matters including his or her character and any conduct in which he or she has engaged (whether before or after becoming an employee).

### Examples of misconduct and other grounds for action

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

Examples of misconduct and other grounds for action under Division 10 include but are not limited to:

- inappropriate relationships with students
- harassment, including sexual harassment, bullying or victimisation of other staff members, students or the public
- racial or religious vilification
- striking a student, other employee or member of the public, or otherwise inflicting harm on, or endangering the life of, another person
- wilfully damaging property
- unlawful discrimination or sexual harassment
- sexual or other criminal offences
- improper use of information, or school or Department resources, for private purposes or personal gain
- refusal to obey a lawful instruction
- alcohol or drug misuse affecting the employee's performance of their duties
- serious or gross negligence
- inappropriate use of the internet or the Department's information technology resources including, for example, accessing pornography
- medical certificate fraud
- conduct involving dishonesty, wilfulness or recklessness, loss or damage.

Allegations dealt with under Division 10 may include conduct outside, as well as inside, the workplace – for example where the employee has failed to maintain the general standards of conduct required in the public sector or where the behaviour contravenes the requirements of [Ministerial Order No 199](#), which sets out the conduct and duties required of employees in the teaching service. Order 199 requires employees to not

behave in any way which would impair their influence over students or standing in the community generally, or outside the hours of duty act in any manner unbecoming his or her position.

## **Sexual harassment**

The Department has a [Sexual Harassment Policy](#) that sets out the rights and obligations of all persons in the workplace in relation to sexual harassment. Sexual harassment, if substantiated, may constitute misconduct. Sexual harassment allegations are to be handled in accordance with the processes in the Guidelines (i.e. Complaints and/or Misconduct).

## **Sexual assault**

Sexual assault involving employees is a criminal offence and the police must be contacted where such an allegation is made. The principal/manager must also contact the Department's Conduct & Ethics Branch.

Alleged sexual offences against children and young persons have mandatory reporting implications and, where this is the case, the Department of Human Services must be contacted. Further information is available at [Child Protection Protocol](#).

The Department has guidelines for use when responding to allegations of student sexual assault in Victorian government schools. For more information, contact the [Student Critical Incident Advisory Unit](#).

## **Suspected criminal offences**

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

Where an employee is the subject of a police investigation, care must be taken not to interfere with the police investigation. Even when the police are involved, the Department has certain responsibilities to fulfil and is entitled to determine appropriate action in terms of the employee's employment.

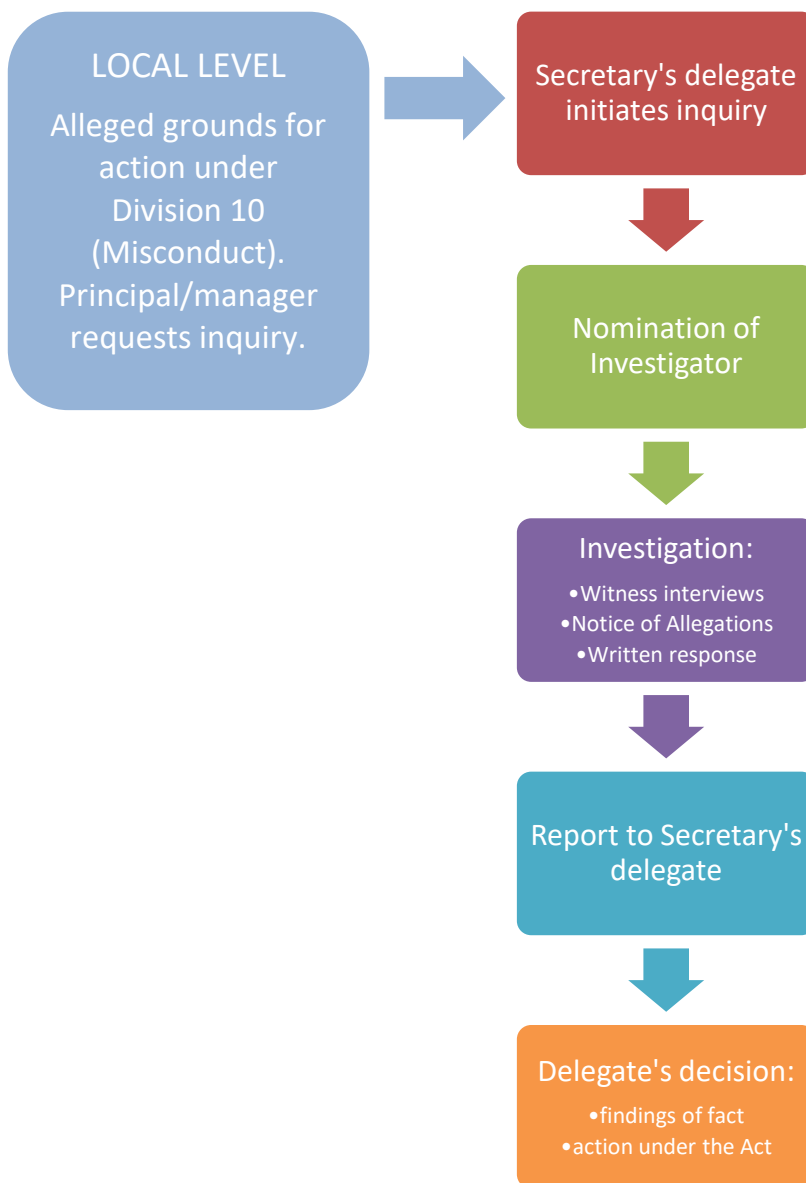
However, close liaison with the Conduct & Ethics Branch and the police is necessary to ensure that the police investigation is not compromised in any way. The Conduct & Ethics Branch is the Department's main liaison point with the Victoria Police.

## **Misconduct procedure**

The procedure for the management of misconduct inquiries is established under section 2.4.62 of the *Education and Training Reform Act 2006*. This section provides that the Secretary must establish procedures for the investigation and determination of an inquiry under Division 10.

The misconduct procedure is as follows:

### Inquiry under Division 10, Part 2.4 (Misconduct)



#### Step 1–Nomination of investigator

Where there appears to be grounds for action under Division 10 of Part 2.4 of the *Education and Training Reform Act 2006*, the principal/manager will in consultation with the Conduct & Ethics Branch write to the Secretary's delegate<sup>2</sup> to advise that there may be grounds for action and to recommend the commencement of an inquiry under Division 10 of Part 2.4 of the *Education and Training Reform Act 2006*. The principal/manager will not provide to the Secretary any details of the particular matter at this stage.

<sup>2</sup> The powers to commence an inquiry and take action under Division 10, Part 2.4 of the Act, are vested in the Secretary but in most cases would be exercised by a delegate such as the Regional Director.

The nomination of the investigator is the first step in the commencement of an inquiry under Division 10 of Part 2.4 of the *Education and Training Reform Act 2006*. The role of the investigator is to collect evidence, prepare a Notice, seek a response from the employee and send a report to the Secretary for his or her consideration and action.

Under Division 10 of Part 2.4 of the *Education and Training Reform Act 2006*, the Secretary will nominate a person as the investigator. In most cases, it will be appropriate for the principal/manager to be the investigator. In addition, investigators may be senior Departmental employees from central and regional offices, other school principals, retired Departmental employees or other suitable persons whose experience or training equips him or her to deal with investigations in educational settings.

### *Step 2– Investigation*

After nominating a person as the investigator, the Secretary will write to the employee to advise that an inquiry under the *Education and Training Reform Act 2006* has commenced and inform the employee of the name of the person who has been nominated as the investigator. The investigator will then write to the employee to explain the process.

The investigation will involve establishing the precise nature of the allegations and possible grounds for action under Division 10 of Part 2.4 of the *Education and Training Reform Act 2006*. This would normally involve reviewing documents and other evidence, separately interviewing those people who may assist in the investigation and obtaining statements from those people if appropriate. In some cases, this process will already have been completed as part of a complaints process.

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

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

### *Step 3– Investigator to prepare the notice*

After the investigation phase, the investigator will prepare a Notice of Allegations, seek a response from the employee, offer the employee the opportunity to participate in an interview and send a report to the Secretary. The Notice to the employee must contain:

- the alleged ground(s) for action under Division 10 of Part 2.4 of the *Education and Training Reform Act 2006*
- the particulars of the alleged ground(s).

The investigator will request the employee to provide a response to the Notice within a suitable time frame (being not less than fourteen (14) and up to twenty-one (21) calendar days). Requests for extensions should be addressed to the investigator.

The investigator will also provide the employee with the opportunity to meet with the investigator to discuss his or her written response to the allegations.

The employee may have a support person/representative present during this meeting (the role of a support person/representative is set out in Part 1 of these Guidelines).

#### *Step 4– Investigator’s report*

The investigator will consider the employee’s response, should one be provided, and will prepare a report for the Secretary. The report will include:

- the alleged grounds, the alleged particulars, and the investigator’s assessment of the evidence
- any response by the employee to the Notice
- all relevant documentary evidence.

Where a report is provided to the Secretary, the employee must be informed in writing that a report has been provided to him or her (a copy of which is to be attached to the notification) and advised that a written response to the report may be provided directly to the Secretary within a suitable time frame, being not less than seven (7) and up to (14) fourteen calendar days of receiving the report.

#### *Step 5– Decision of the Secretary*

The Secretary will consider the report provided by the investigator and the employee’s response if provided. The Secretary may:

- request the investigator to conduct further investigation and provide a further report under Division 10 of Part 2.4 of the *Education and Training Reform Act 2006*; or
- hold an oral hearing or take evidence orally.

Based on the material provided, the Secretary will form a preliminary view as to the facts of the matter. After this, the Secretary will either:

- write to the employee to advise that, on the basis of preliminary findings of fact (which will be set out in the letter) it would be open to the Secretary:
  - to find that there are grounds for action; and
  - to take action against the employee (specifying what action is contemplated)and invite the employee to make a submission in writing to the Secretary within 14 calendar days addressing one or more of these matters. The Secretary should set out clearly his or her preliminary view on the grounds and proposed action; or
- request the investigator to conduct further investigation and provide a further report to the Secretary under Division 10 of Part 2.4 of the *Education and Training Reform Act 2006*; or
- take no action on the basis that no grounds for action exist.

Where the Secretary finds that there are one or more grounds under Division 10 of Part 2.4 for taking action against an employee, he or she may take one or more of the following actions:

- terminate the employee's employment
- reduce the employee's classification
- fine the employee up to 50 penalty units (penalty units are indexed annually and at the time of publication 50 penalty units is equal to \$7,218. The way in which penalty units are set and calculated is contained in the *Monetary Units Act 2004*)
- reprimand the employee.

The Secretary will by Notice in writing advise the employee of the determination and, if the Secretary takes action, the right to appeal to a Disciplinary Appeals Board.

## **PART 4      GUIDELINES FOR MANAGING UNSATISFACTORY PERFORMANCE IN THE TEACHING SERVICE UNDER DIVISION 9A OF PART 2.4 OF THE EDUCATION AND TRAINING REFORM ACT 2006**

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### **Introduction**

**Principals/managers must contact the Conduct & Ethics Branch at the commencement of the unsatisfactory performance procedures.**

The role of principals/managers is to recognise and acknowledge good performance, encourage improved performance, and to address unsatisfactory performance using appropriate measures.

Effective performance and development arrangements seek to continuously support and enhance the way work is undertaken by employees. While established performance and development arrangements provide opportunities for performance assessment and development, a repeated failure by an employee to meet the standards may necessitate the commencement of the unsatisfactory performance procedures.

The Conduct and Ethics Branch must be contacted at this stage.

The purpose of the unsatisfactory performance procedures is to assist the employee to improve his or her performance to the required standard. The unsatisfactory performance procedures are to be completed as early as possible within a maximum thirteen week period, although it is recognised that circumstances may arise where this is not possible.

*Note: Where the unsatisfactory performance procedures have been implemented, the normal performance and development process will not take place and the employee will not be eligible for salary progression, if applicable, provided the employee has been notified in accordance with the relevant provisions of the Victorian Government Schools Agreement 2013.*

### **Commencing the unsatisfactory performance process**

Where an employee fails to meet the required standard of performance, it is important to consider factors that may be contributing to the unsatisfactory performance.

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

Issues of a personal nature, such as health or personal relationships can also affect performance. Sensitivity will need to be exercised in recognising and dealing with these factors, and the Department's Employee Safety and Wellbeing Branch is available to

provide information on the services that are available to assist employees in this situation.

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

Where it is considered that counselling may be appropriate this can be arranged through the Department's [Employee Assistance Program](#). The telephone contact number for employees wishing to access the Employee Assistance Program is **1300 361 008**.

The Employee Assistance Program comprises:

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

The Employee Assistance Program can provide early and effective support to employees and can supplement other workplace support services provided by the Employee Safety and Wellbeing Branch of the Department.

### What is unsatisfactory performance?

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

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

*Note: In limited circumstances, it may be appropriate to address the conduct under the misconduct procedures (Part 3 of these Guidelines).*

The roles and responsibilities and the standards of performance and conduct that can be expected of employees are set out in a number of documents or instruments including but not limited to:

- [Ministerial Orders](#)



- [Industrial Agreements](#)
- Department policy statements including the applicable Performance and Development Guidelines.
- The Victorian Public Sector [Code of Conduct](#)
- Role and responsibilities statements

Part 11 of [Ministerial Order 199](#) provides a comprehensive list of the conduct and duties expected of employees. For example, employees are required to:

- Be civil, courteous and observe fairness and equity in all official dealings with students, the public and members of the school community.
- Refrain from obstructing, preventing or deterring the principal/manager from carrying out his or her duties.
- Comply promptly with all lawful instructions given to him or her by the principal.
- Carry out the duties as required by the principal of the school such as:
  - Comply with the timetable at the school
  - Perform their official duties with reasonable skill, care and diligence
  - Maintain a record of procedure and instruct students accordingly
  - Maintain proper order and discipline among the students
  - Give full cooperation to the principal and other employees in the development and implementation of the course of study to be followed and in the performance of their respective duties
  - Assess the educational development of students and provide reports to parents
- Promote the general welfare of students.
- Observe safe working practices so as not to endanger themselves or others.

### General principles regarding unsatisfactory performance

Consideration of an employee's performance must be fair and comply with the principles of natural justice which provide for:

- (a) the right of an employee to be informed of the nature of any alleged unsatisfactory performance
- (b) the right of an employee to respond in respect of his or her alleged unsatisfactory performance
- (c) the right of an employee to be treated fairly, and
- (d) fairness and good faith in decision making.

## Unsatisfactory performance procedure

The unsatisfactory performance procedure may be implemented at any time when a principal/manager considers that an employee's performance is unsatisfactory. A principal/manager should address an employee's unsatisfactory performance as soon as this comes to his or her attention.

**Principals/managers must contact the Conduct & Ethics Branch prior to the commencement of the unsatisfactory performance procedure. The Conduct & Ethics Branch will assist principals/managers in its implementation.**

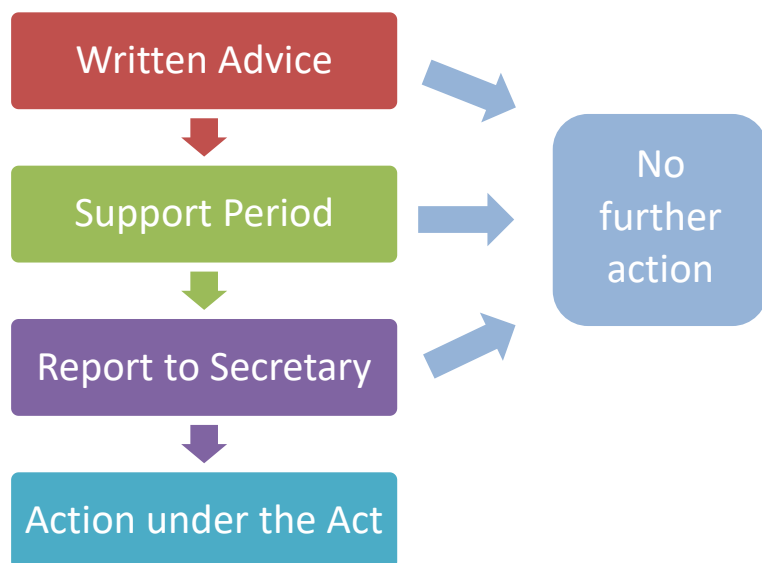
**An employee's unsatisfactory performance may give rise to action under Division 9A of the *Education and Training Reform Act 2006*.**

Under section 2.4.59B of the *Education and Training Reform Act 2006*, the Secretary must establish procedures for:

- (a) the improvement and management of alleged unsatisfactory performance by employees; and
- (b) making determinations in respect of the unsatisfactory performance of employees and other related decisions.

The unsatisfactory performance procedure is illustrated below:

### Stages in the management of unsatisfactory performance



### Step 1 – Written advice to employee

Where a principal/manager considers that an employee's performance is unsatisfactory, the principal/manager must advise the employee in writing of the following:

- That the employee's performance is considered to be unsatisfactory
- The particular areas of unsatisfactory performance
- The required standard of performance

- The consequences of continued failure to meet the required standard (i.e. that the employee's unsatisfactory performance may ultimately lead to a determination under section 2.4.59F of the *Education and Training Reform Act 2006* which may result in dismissal)
- That the employee has five working days (or such longer period as the principal/manager considers reasonable in the circumstances) to explain any reasons for the unsatisfactory performance
- That the employee may have a support person/representative of his or her choice present during meetings (Refer to Part 1 in these Guidelines for further information) and
- Of the existence of these procedures (a reference to where they may be accessed should also be provided).

The principal/manager should consider meeting with the employee to discuss the matters raised in the written advice and/or any written response.

After consideration of the employee's response, or following a failure by the employee to respond within the set period, the principal/manager must notify the employee in writing either that:

- Performance is satisfactory and no further action will be taken at this time (a copy of this letter should be placed on the employee's personnel file); or
- Performance continues to be unsatisfactory and an opportunity will be provided for the employee to improve his or her performance to the required standard with appropriate support as outlined below. In this case, the employee is to be advised that he or she may appeal the decision to the [Merit Protection Boards](#). However, an appeal will not delay the continuation of these procedures.

### *Step 2 – Support period*

Where the principal/manager has informed the employee that an opportunity will be provided to improve his or her performance to the required standard, a support period will commence. The duration of the support period will depend on the circumstances but cannot be less than ten working days and will normally be between two and seven weeks, excluding school vacation periods. In determining the length of the support period the principal/manager will need to consider the time reasonably required to improve the performance in the identified area(s) and any previous actions taken to support improved performance.

Where an employee who is subject to unsatisfactory performance procedures is absent due to illness or another form of approved leave the support period would normally be extended.

In accordance with the general principles, prior to the commencement of the support period the principal/manager will generally do the following:

- Detail the support, where relevant, that will be provided to assist the employee to improve his or her performance and how feedback will be provided

- Detail how the performance will be monitored, and
- Establish a schedule of meetings to provide the opportunity to discuss progress, receive advice, support and feedback.

If the principal/manager writes to the employee to provide the details of the support that will be provided, he or she will also invite the employee to suggest any additional support that the employee may find useful.

Support may involve, but is not limited to, the following: establishing a support group comprising high performing colleagues who would provide feedback and coaching on relevant areas, external professional development, opportunity to observe effective practitioners (this may occur at neighbouring schools), performance counselling and, in relation to teachers, constructive feedback on observations of the employee's classes, team teaching, scheduled discussions, and additional time release from scheduled duties for planning purposes.

If a support group is established, the principal/manager may choose to provide advice in writing to the support group members to explain their role and provide them with the reporting requirements. A written copy of this advice will be provided to the employee. The principal/manager should not be a member of any support group that is established but should guide and monitor the work of the group.

The principal/manager will ensure that a written record of the support that is provided, including meeting records, is maintained and copies provided to the employee in a timely manner. These records will form part of any report to the Secretary and will be important during any subsequent appeal proceedings.

During the course of the support period, it may be appropriate for the support available to the employee to be reduced progressively to allow the employee to demonstrate achievement of the required standards in the context of the usual professional support available for employees.

During the support period, the employee's performance will be monitored regularly. This can involve direct observation of the employee at work, with or without notice, reports provided by appropriate staff, review of employee's records and consideration of student outcomes.

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

### *Step 3 – Completion of support period*

At the completion of the support period the principal/manager must assess the performance of the employee against the standards outlined in the written advice.

#### ***Where performance is satisfactory***

Where the principal/manager considers the employee's performance to be satisfactory, he or she should advise the employee in writing that no further action will be taken provided their performance continues to be at or above the required standard.

### ***Where performance remains unsatisfactory***

Where the principal/manager considers that the employee's performance continues to be unsatisfactory, he or she should advise the employee of this view in writing and the employee is to be given five working days or longer to explain any reasons for the continued unsatisfactory performance.

After considering any response or failure to respond within the set period, the principal/manager will notify the employee in writing:

- (a) Performance continues to be unsatisfactory and a second support period will be provided on the basis that the principal/manager considers there to be a realistic opportunity for the employee's performance to improve to a satisfactory standard during a second period of support; or
- (b) Performance continues to be unsatisfactory and a report will be prepared for the Secretary to consider making a decision in accordance with section 2.4.59F of the *Education and Training Reform Act 2006*.

The principal/manager must notify the employee of their final decision in writing.

**If the principal/manager decides to offer an additional support period, go back to Step 2, above.**

**If the principal/manager decides to provide a report to the Secretary, a copy of the report will be given to the employee.**

### ***Step 4 – Decision of Secretary<sup>3</sup> on receiving report***

On receipt of a report from a principal/manager which concerns an employee's unsatisfactory performance, the Secretary must consider the report and any response from the employee and may make any of the following decisions:

- (a) Defer a determination on whether or not there has been unsatisfactory performance until the Secretary receives a further report in relation to the employee. (This option may be utilised where the Secretary considers that a further support period is necessary).
- (b) Proceed to make a determination on whether or not the employee's performance is unsatisfactory.
- (c) Investigate any or all of the matters in the report under Division 10 (i.e. where the allegations relate to misconduct).
- (d) Proceed no further with any of the matters in the report.

If the Secretary decides to investigate any or all of the matters in a report under Division 10 (Misconduct) the Secretary must not proceed any further under Division 9A in relation to any of those matters investigated under Division 10 (Misconduct).

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<sup>3</sup> The powers to make findings and take action under Division 9A of Part 2.4, are vested in the Secretary, but in most cases would be exercised by a delegate.

### *Step 5 – Notice to employee regarding proposed determination*

If the Secretary decides to proceed to making a determination on whether or not there has been unsatisfactory performance, notice must be given to the employee in writing advising the employee—

- (a) Of the allegation of unsatisfactory performance (a copy of the report must accompany the notice, as the report will contain the details of the unsatisfactory performance)
- (b) Of the preliminary view of the Secretary in relation to the matters in the report
- (c) Of the actions that may be taken by the Secretary under Division 9A (a reprimand, a reduction in classification or dismissal) and the action that the Secretary proposes to take in relation to the employee, and
- (d) That the employee may make a submission in writing addressing the matters in the report, the preliminary view in relation to the matters in the report and the actions that the Secretary proposes to take.

A submission by an employee per (d) must be received by the Secretary no later than 14 calendar days after the employee is given notice, or any longer period permitted by the Secretary. Any application for an extension of time should be made in writing to the Secretary setting out the reasons for the application.

### *Step 6– Notice to employee regarding outcome*

After considering any submission from the employee, the Secretary may make a determination as to whether or not there has been unsatisfactory performance and may take any of the following actions against the employee:

- (a) issue a reprimand;
- (b) reduce the employee's classification; or
- (c) termination of the employee's employment.

In making a determination, the Secretary must:

- (a) take into account any report received from the principal/manager; and
- (b) take into account any submission received from the employee; and
- (c) comply with these procedures.

If the Secretary makes a determination, he or she must give notice in writing to an employee:

- (a) advising of the determination made, including any action that the Secretary has taken; and
- (b) if action has been taken, advising the employee of his or her right of appeal to a [Disciplinary Appeals Board](#).

Employees may also elect to appeal to the Fair Work Commission against action taken by the Secretary.

## PART 5 APPEALS, REVIEWS AND NOTIFICATIONS TO THE VICTORIAN INSTITUTE OF TEACHING (VIT)

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### Notification to Victorian Institute of Teaching

In accordance with section 2.6.31 of the *Education and Training Reform Act 2006*, the Department will inform the [Victorian Institute of Teaching](#) of the outcome of any action taken by the Department against a registered teacher (which includes employees in the principal class) in response to allegations of serious incompetence of the registered teacher, serious misconduct of the registered teacher or that the registered teacher is unfit to be a teacher or any other actions that may be relevant to the registered teacher's fitness to teach.

### Merit Protection Boards

The [Merit Protection Boards](#) hear personal grievance applications made by employees in the teaching service in accordance with Part 5 of Ministerial Order 199.

Personal grievance applications must be made within 14 days of notification of the decision.

### Disciplinary Appeals Boards

The [Disciplinary Appeals Boards](#) hear appeals on action taken under Division 9A (Unsatisfactory Performance) and Division 10 of Part 2.4 (Misconduct) of the *Education and Training Reform Act 2006*.

A notice of appeal must be lodged with the senior chairperson of the Disciplinary Appeals Boards within 14 days after the date on which the employee is given notice in writing of the determination of the Secretary.

### Fair Work Commission

The unfair dismissal provisions of the *Fair Work Act 2009 (Cth)* provide an avenue for eligible persons to make a claim of unfair dismissal or unlawful termination of employment within 21 days of the date of termination.

Employees wishing to make a claim for unfair dismissal or unlawful termination of employment need to consider the relevant sections of the *Fair Work Act 2009* and *Fair Work Regulations 2009*. There are three main types of applications.

They involve a termination that was allegedly:

1. harsh, unjust or unreasonable (unfair dismissal);
2. in breach of discrimination provisions (unlawful termination); and/or
3. in breach of minimum notice provisions (unlawful termination).

Different eligibility criteria apply to each of the above (see: [www.fwc.gov.au](http://www.fwc.gov.au)).

## FURTHER ASSISTANCE AND ADVICE

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