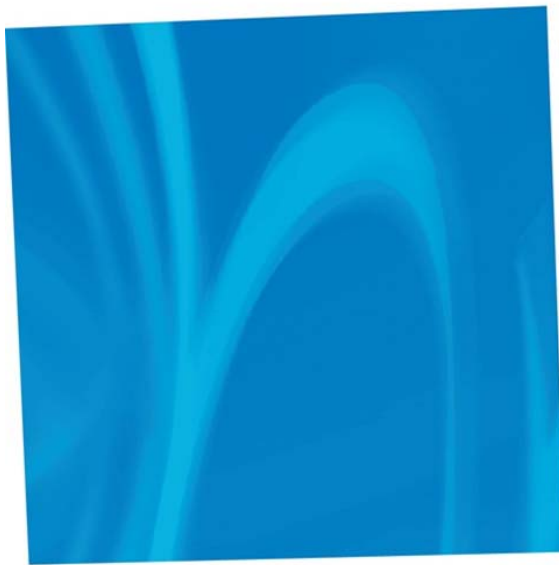




Department of Education and
Early Childhood Development

Human Resources

Guidelines for Managing Complaints, Unsatisfactory Performance and Misconduct – Teaching Service



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GUIDELINES FOR MANAGING COMPLAINTS, UNSATISFACTORY PERFORMANCE AND MISCONDUCT

CONTENTS	PAGE
Part 1 General Principles Applicable to Managing Complaints, Unsatisfactory Performance and Misconduct for all Employees	2
Part 2 Guidelines for Managing Complaints against Employees	12
Part 3 Guidelines for Managing Misconduct in the Teaching Service Under Division 10 of the Education and Training Reform Act	21
Part 4 Guidelines for Managing Unsatisfactory Performance in the Teaching Service Under Division 9A of the Education and Training Reform Act 2006	28
Part 5 Appeals, Reviews and Notifications to the Victorian Institute of Teaching (VIT)	38
Further assistance	39

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

Overview

Every day, principals and 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 Early Childhood Development (“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.

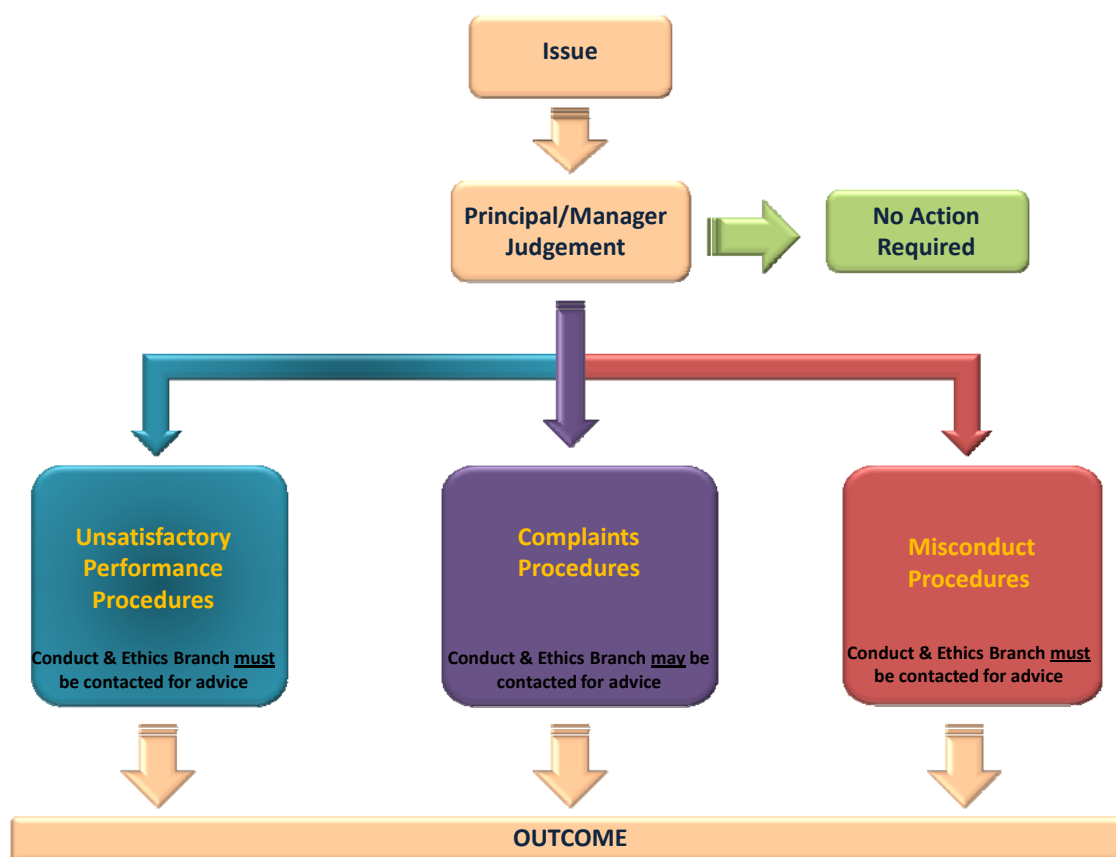
The Department has a responsibility to ensure that employees maintain high standards of conduct and performance. The Department is committed to a high performing workforce and to providing safe and supportive work environments where excellence is pursued, underperformance is managed, diversity is valued and everyone is treated with respect, fairness and dignity. Discrimination, sexual and other forms of harassment, bullying, violence and threatening behaviour are unacceptable. It is therefore incumbent on a principal or 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.

Which process should be used?

In relation to a particular issue or incident, the principal or 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 or 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 and 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.

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 other than principals and managers.

The **complaints** process should be used for dealing with incidents such as those described in the complaints section of the Guidelines. The absence of a written complaint does not prevent the complaints process being implemented. The **unsatisfactory performance** process should be used in relation to unsatisfactory performance. Unsatisfactory performance may ultimately lead to action by the Secretary under *Education and Training Reform Act 2006*. The **misconduct** procedures are to be applied to an employee who is alleged to have engaged in conduct of a serious nature warranting action by the Secretary under *Education and Training Reform Act 2006*. The processes for the management of complaints, unsatisfactory performance and misconduct are set out below.

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

The principal/manager or decision-maker 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 principals. A reference to the Secretary may include a reference to the Secretary's delegate. A reference to a principal or manager may also include a reference to an investigator where one has been appointed.

Fairness for all

In the management of complaints, misconduct and 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 in 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 interviews (the role of the support person 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 or 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 should:

- support the education and welfare of students ensuring appropriate duty of care is maintained.
- reinforce that the Department will consider all matters seriously.
- ensure that all matters are dealt with in a fair and consistent manner.
- highlight occurrences of unacceptable and inappropriate behaviour and the need for preventative strategies in particular areas.
- meet the Department's legal obligation to take all 'reasonable precautions' to prevent discrimination and sexual harassment.

- reduce the risk of the Department, the school council or other parties being held vicariously liable for the actions of individuals that contravene anti-discrimination legislation.
- prevent the unnecessary escalation of the situation.
- occur in a timely manner.
- ensure the provision of natural justice to all parties, as appropriate.

Public sector values and employment principles

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

Public sector values

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

a. Responsiveness

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

b. Integrity

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

c. Impartiality

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

d. Accountability

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

e. Respect

- demonstrate respect for colleagues, other public officials and members of the Victorian community by:
- treating them fairly and objectively
- ensuring freedom from discrimination, harassment and bullying
- using their views to improve outcomes on an ongoing basis

f. Leadership

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

g. Human rights

- respect and promote the human rights set out in the [Charter of Human Rights and Responsibilities](#) by:
 - making decisions and providing advice consistent with human rights
 - actively implementing, promoting and supporting human rights

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

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

These may be obtained from the [State Services Authority's](#) website.

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

Employment principles

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

- employment decisions are based on merit

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

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

Role of support person during meetings

An employee who is the subject of a complaint, unsatisfactory performance or misconduct process has the right to have a support person present at meetings with their principal/manager or the decision-maker. If the employee chooses not to have a support person the process should still continue. It should be minuted that the employee declined to have a support person present.

The role of the support person is to provide professional and moral support to the employee concerned. He or she also acts as a witness or observer to the process.

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

If the support person is a professional advocate, this person should be advised that their role during the meeting is that of a support person and not an advocate. The representative may be used by the employee to provide legal or other advice to the employee, but this is a separate function from their role during the meeting.

The support person may not disrupt the process, direct the process or otherwise interfere with the interview. If the support person has questions of substance (whether legal or procedural) that may interfere with the interview or disrupt the process, those questions should be raised at least three days prior to the interview or within 3 days of the interview.

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

Subject to the note in italics below, if during a meeting, the support person wishes to comment or provide advice to the employee, the meeting should be adjourned. Should a support person attempt to intervene, direct the process or advocate on behalf of the employee, he or she should be warned that this contravenes the role of support person. If the support person persists, the support person may be asked to leave the meeting and the meeting may continue without them or be terminated and rescheduled.

Note: In some meetings, the support person may have a valuable role in clarifying matters between the principal/manager and the employee and the support person may speak to the principal/manager on behalf of the employee where the principal/manager agrees. In such cases, the support person should not present arguments or opinion.

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

Confidentiality

All persons involved in a complaints, 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 successfully 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, 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 or manager must ensure that they observe appropriate confidentiality in relation to the management of any complaint, unsatisfactory performance or misconduct procedure. The principal or 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 or 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 or 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 or 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 or 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 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 and 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 or 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.

Whistleblowers protection

Where a complainant has real and substantial concerns that, as a result of raising a complaint, they may suffer a detriment, they may have access to protection under the provisions of the *Whistleblowers Protection Act 2001*. The *Whistleblowers Protection Act 2001* defines the types of complaints that may be accepted as complaints under the Act.

The *Whistleblower Protection Act 2001 - Department of Education and Early Childhood Development 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 or 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.

Documentation

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

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

Generally only the principal or 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 and 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 and managers may also need to ensure the confidentiality of any emails sent or received in relation to a particular matter.

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

For further information in relation to accessing personal files in schools, see the Department's [School Policy and Advisory Guide](#).

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 a 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 and 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 and managers and school leaders 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 WorkSafe Authority
- decisions made, or not made, by the principal or manager that a complainant believes are unfair, unreasonable or inappropriate

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

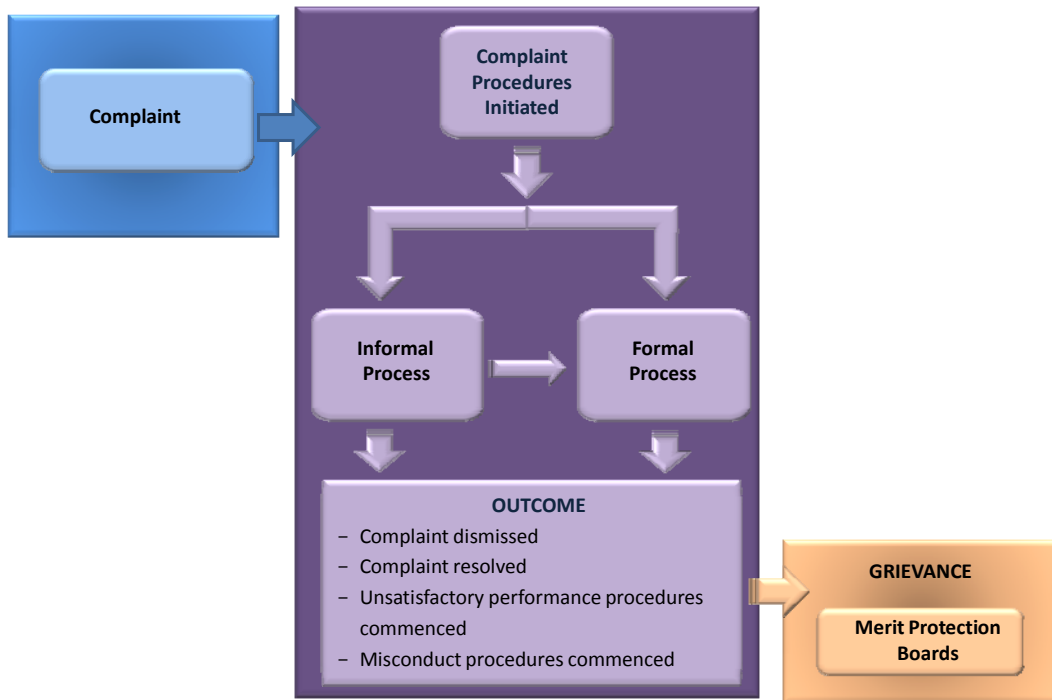
It is important that all steps in the complaints process are documented.

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

Complaints resolution processes

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

Procedures for Managing Complaints



The complaints resolution processes encompass both informal and formal action.

Upon receiving a complaint the principal or 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 or 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 or manager should give the complainant his or her reasons in writing.

The principal or 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 or manager must contact the Conduct & Ethics Branch for advice.

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

Informal process

The principal or manager may decide to respond to a complaint through an informal process where:

- a complaint is of a minor nature
- the complainant wishes the matter dealt with informally and the principal or manager considers this appropriate in the circumstances

- a complaint has arisen from lack of, or unclear, communication.

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

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

Mediation

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

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

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

Any party involved in the mediation process may include another person for support and assistance. No party to the mediation process may be represented by another person acting 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 will be applied in 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
- 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.

The Department's [Employee Assistance Program](#) may also assist with a mediation process. The telephone contact number for employees wishing to access the Employee Assistance Scheme is 1800 337 068. The Employee Assistance Scheme comprises two elements:

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

It is intended that the Employee Assistance Scheme will provide early and effective support to employees requiring assistance as well as supplement the other important support services provided by the Employee Health Unit including the [Healthy Schools are Effective Schools](#) online resource, mediation, leadership development and team facilitation.

Informal complaints procedures involving allegations of sexual harassment

Allegations of sexual harassment must be treated seriously and in most cases should be handled in accordance with the formal complaints process.

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 seek 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 employer has an obligation to the whole workplace and may be required to take action regardless of the complainant's wishes.

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

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

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

Supportive actions of principal or manager in dealing with sexual harassment

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

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

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

Formal process

Matters raised directly with the principal or manager or otherwise brought to the principal's attention may warrant the use of a formal process. The Conduct & Ethics Branch may be contacted for advice and support in the implementation of the formal complaints process.

The formal complaints process comprises the following steps:

- 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 or manager to investigate the complaint to determine whether or not it has substance.

An investigation will 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 or manager they wish to remain anonymous, the principal or manager needs to establish why the complainant does not want their identity disclosed. In this respect, the principal or 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 or manager.
- Where a complaint has been received in writing, the principal or manager should acknowledge receipt of the complaint in writing.
- Providing to the employee the details of the complaint in writing and providing the employee with an opportunity to provide a response in writing. 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 or 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 present during all meetings as part of this process (the role of the support person is defined in this document under the heading “Support Person”).
- If the principal or manager considers it necessary or appropriate in the circumstances, providing the opportunity for the employee to meet with the principal or manager in person to clarify matters in the response.
- The investigation must be sufficiently thorough to allow the principal or manager to arrive at a reasonable state of satisfaction that on the balance of probabilities the complaint is or is not substantiated. It is not necessary to interview every witness to an incident to arrive at a decision regarding substance.

Note: Where an employee is invited to provide a written statement but does not do so, or chooses not to meet with the principal, this does not prevent the investigation of the complaint proceeding. Employees should be informed of the implications of not providing 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 or manager should give consideration to whether a student’s parent 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 or 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.

In making a decision, the principal or manager should consider the evidence collected during the investigation. The principal or manager should be satisfied, so far as is possible, of the facts of the situation and make a decision based on this assessment. The investigation must be sufficiently thorough to allow the principal or manager to

arrive at a reasonable state of satisfaction that, on the balance of probabilities, the complaint is or is not substantiated. For example, it is not necessary to interview every witness to an incident to arrive at a decision regarding substance.

The standard of proof is a civil standard of the balance of probabilities – that, on the balance of probabilities, it is more likely than not, that the allegation occurred. 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 or 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 relied upon, but may be given less weight than direct evidence.

Step 3 Determining appropriate action

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

Complaint not substantiated

The principal or manager may determine that a complaint does not have substance and dismiss it. In this case the principal or manager should clarify any misunderstandings and deal with the issues. This may involve:

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

Complaint substantiated

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

In determining appropriate action, the principal or 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 personal file, along with the other documentation
- implementing a formal period of monitoring

- provision of a mentor
- referral to professional development
- completing the Department's Online Workplace Discrimination or Workplace Bullying Course and Sexual Harassment Training Course, if this has not already occurred (or re-doing the course if appropriate)
- referring the employee to the Department's [Employee Assistance Program](#)
- implementing unsatisfactory performance procedures
- implementing the misconduct procedures
- other appropriate action

Where the complaint raises significant issues in relation to unsatisfactory performance, the principal or manager should raise these issues through the [performance and development](#) process and give consideration to implementing unsatisfactory performance procedures in accordance with the 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 the details of the action taken against the employee as that information is personal information between the employer and the employee.

Document management

As soon as possible after making and acting on a decision, the principal or manager should attach a copy of all documentation related to the complaints process to the employee's personal file (Refer section 1.12 in 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.

Further information in relation to personal grievances and review of action is available at: <http://www.eduweb.vic.gov.au/hrweb/employcond/res/griev.htm>

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

Introduction

Some, but not all, allegations of misconduct will first be handled by the principal or 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 or manager has formed a view that there may be grounds for action under Division 10 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 or 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 counseling.

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 section 10 of this Act; or
- (f) contravenes a requirement by or under any Act that corporal punishment not be administered to any State school student; or
- (g) without reasonable excuse, contravenes or fails to comply with a lawful direction given to the officer or 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): see section 2.4.60(2) of the *Education and Training Reform Act 2006*.

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 employees performance of their duties
- serious or gross negligence
- inappropriate use of the internet or the Department's information technology resources including for example accessing pornography
- medical certificate fraud
- conduct involving dishonesty, wilfulness or recklessness, loss or damage.

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 members of 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 (ie Complaints and/or Misconduct).

Sexual assault

Sexual assault involving employees is a criminal offence and the police must be contacted. The principal or 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. For information on the Department's 'protecting children protocol' and 'mandatory reporting' see the health and wellbeing section of the Department's website at:

<http://www.education.vic.gov.au/healthwellbeing/safety/childprotection/childprotection.htm>

The Department has guidelines for use when responding to allegations of student sexual assault against students in Victorian Government Schools. For more information, see the following links on the Department's website:

- Responding to allegations of student sexual assault
- Student Critical Incident Advisory Unit
- Information and Support

Suspected criminal offences

Principals and 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 or manager, or he or she becomes aware that an employee is the subject of a police investigation, the principal or manager should immediately contact the Conduct & Ethics Branch.

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

However, close liaison with the 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 in respect of employee conduct.

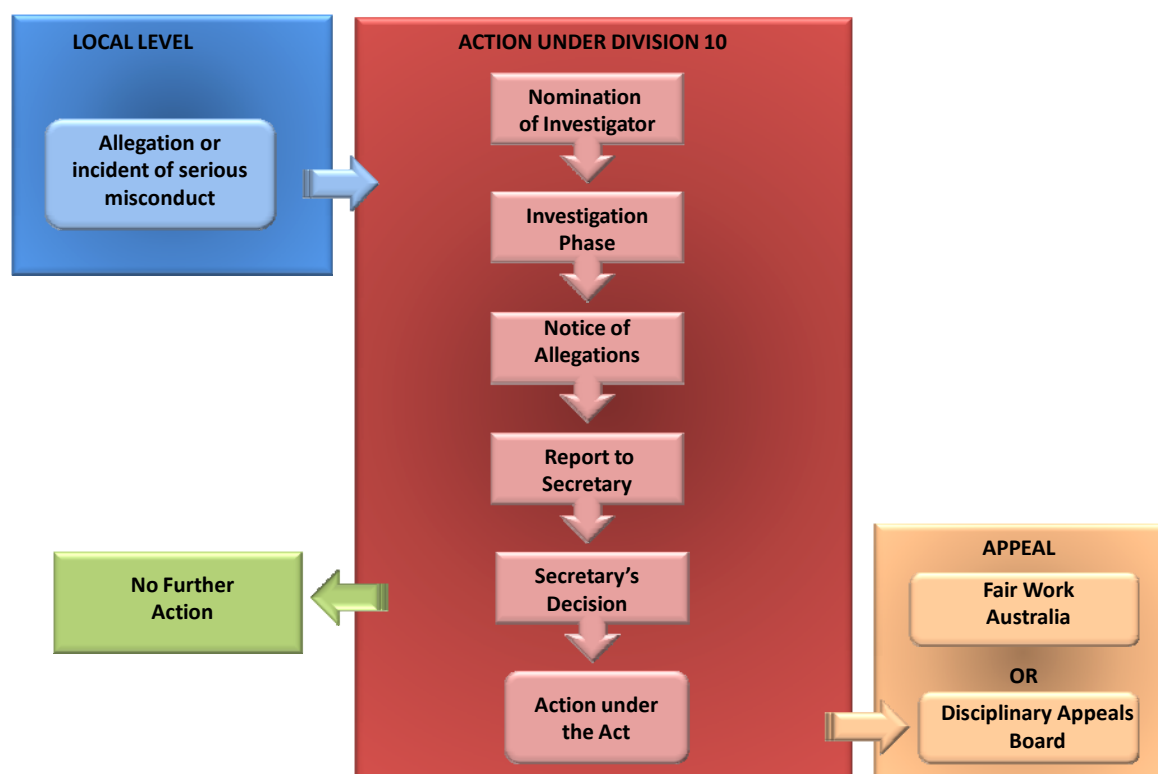
Misconduct procedures

The misconduct procedures are 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 role of the Conduct & Ethics Branch in relation to the procedures is to provide legal and procedural advice to principals and managers and decision-makers.

The misconduct procedures are as follows:

Procedures for Managing Misconduct



Step 1—Nomination of investigator

Where there appears to be grounds for action under Part 2.4 of Division 10 of the *Education and Training Reform Act 2006*, the principal or manager will in consultation with the Conduct & Ethics Branch write to the Secretary to advise that there may be grounds for action and to recommend the commencement of an inquiry under Part 2.4

of Division 10 of the *Education and Training Reform Act 2006*. The principal or manager will not provide to the Secretary any details of the particular matter at this stage.

The nomination of the investigator is the first step in the commencement of an inquiry under Part 2.4 of Division 10 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 the Secretary's consideration and action.

Under Part 2.4 of Division 10 of the *Education and Training Reform Act 2006*, the Secretary will nominate a person as the investigator. In some but not all cases, it will be appropriate for the principal to be the investigator. In addition to the principal, 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.

Where the principal is the subject of the allegations, the investigator may be the Regional Director. In most cases, however, the investigator will be a person other than the Regional Director such as a senior Departmental employee from a central or regional office, a retired Departmental employee or another suitable person whose experience or training equips him or her to deal with investigations in educational settings.

Step 2– Investigation Stage

Once the Secretary has nominated 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 Part 2.4 of Division 10 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 local complaints process.

The employee must not approach witnesses to discuss the details of the complaint. 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 or 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 may be regarded as a serious breach and may lead to additional action in respect to misconduct.

An employee may nominate to the principal or 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 or 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 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 or a representative present during this meeting (the role of a support person and the role of a representative is set out in this document under the heading “Support Person”).

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 the Secretary (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 days of receiving the report.

Step 5– Secretary’s decision

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

- request the investigator to conduct further investigation and provide a further report to the Secretary under Division 10 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 the Secretary's 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 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 for taking action against an employee, the Secretary may take one or more of the following actions against the employee-

- 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 \$6,107. 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.

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 members of 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.

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

Introduction

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

The purpose of the unsatisfactory performance procedures is to assist the employee to improve his or her performance to the required standard.

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

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

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

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

Where an employee fails to meet the required standard of performance, it is important to consider the reasons for the unsatisfactory performance.

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

Issues of a personal nature, such as health, personal relationships and career direction, can also affect performance. Sensitivity will need to be exercised in recognising and

dealing with these factors, and the Department's Employee Health Branch is available to provide information on the services that are available to assist employees in this situation.

In cases where the principal or 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 1800 337 068.

The Employee Assistance Program comprises two elements:

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

It is intended that the Employee Assistance Program will provide early and effective support to employees requiring assistance as well as supplement the other important support services provided by the Employee Health Unit of the Department.

What is unsatisfactory performance?

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

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

The appearance of such conduct may indicate that the unsatisfactory performance procedures need to be implemented.

Note: The misconduct procedures may, if appropriate, be used in relation to conduct that appears to satisfy (c) above, where this conduct is not accompanied by unsatisfactory performance.

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 Performance and Development Guidelines.
- The Victorian Public Sector [Code of Conduct](#)
- Roles and responsibility statements

Part 11 of [Ministerial Order 199](#) provides a comprehensive list of the conduct and duties expected of employees under that Order. 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 or manager from carrying out his or her duties.
- Comply promptly with all lawful instructions given to him or her by the principal or manager.
- Carry out the duties as required by the principal or manager of the school such as:
 - Comply with the time-table 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 or manager and other staff in school program
 - 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. In accordance with section 2.4.59B(3) of the *Education and Training Reform Act 2006*, the unsatisfactory performance procedures in the Guidelines comply with the principles of natural justice and provide for:

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

Unsatisfactory performance procedures

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

Principals and managers must contact the Conduct & Ethics Branch prior to the commencement of the unsatisfactory performance procedures. The Conduct & Ethics Branch will assist principals and managers in the implementation of these procedures. An employee's unsatisfactory performance may give rise to action under Division 9A of the *Education and Training Reform Act 2006*.

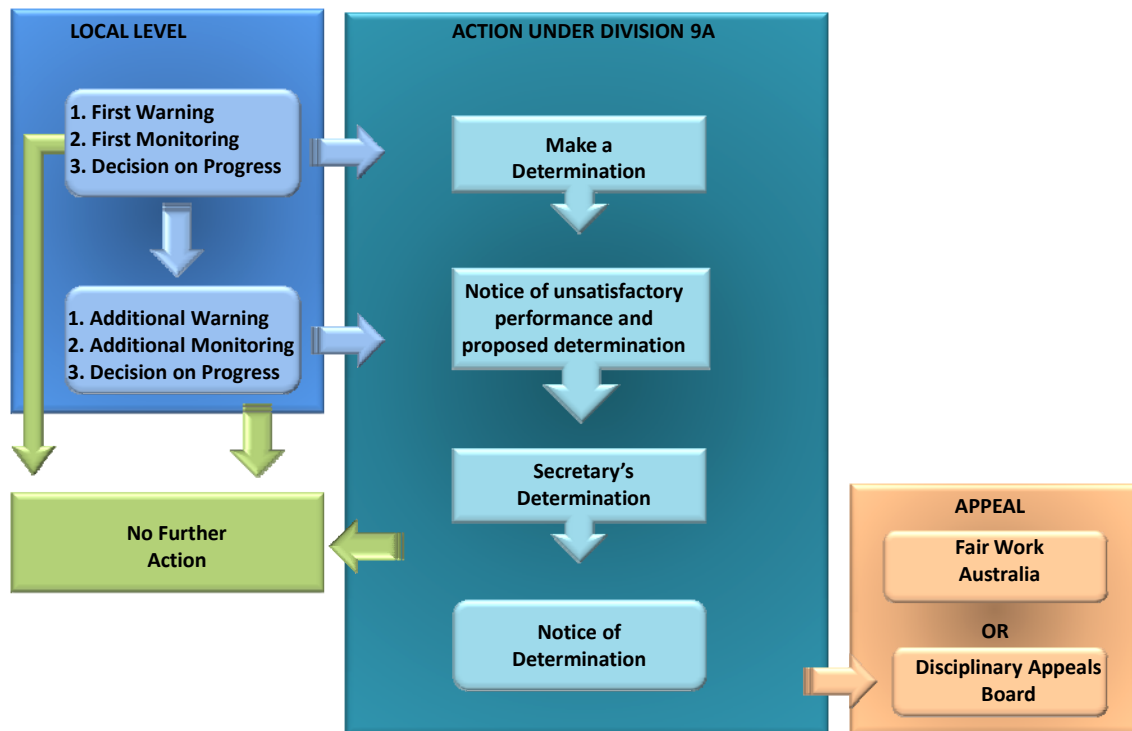
Under section 2.4.59B of the *Education and Training Reform Act 2006*, the Secretary must establish procedures for:

- (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.

Steps 1 to 4 of this part of the Guidelines contain the procedures under section 2.4.59B(1)(a) and steps 5 to 7 contain the procedures under 2.4.59B(1)(b) of the *Education and Training Reform Act 2006*.

The unsatisfactory performance procedures are illustrated below:

Procedures for Managing Unsatisfactory Performance



Step 1—Formal warning to the employee

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

- That his or her performance is considered to be unsatisfactory;
- The areas of unsatisfactory performance;
- The required standard of performance;
- The consequences of continued failure to meet the required standard (ie 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 he or she has three working days (or such longer period as the principal or manager considers reasonable in the circumstances) to explain any reasons for the unsatisfactory performance;
- That he or she may have a support person present during meetings (Refer section 1.5 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 or manager must provide the opportunity for the employee to meet and discuss the matters raised in the formal warning, unless the principal or manager has

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

recently discussed with the employee the matters raised in the warning including the provision of an opportunity to respond to them.

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

- No further action will be taken at this time and warning of the consequences of further instances of unsatisfactory performance (a copy of this letter should be placed on the employee's personal file); or
- An opportunity will be provided for the employee to improve his or her performance to the required standard (during a monitoring period) with appropriate support as outlined below.

Step 2– Support and monitoring period

Where the principal or manager has informed the employee that an opportunity will be provided to improve his or her performance to the required standard, a period of monitoring will be set. The duration of the monitoring period will depend on the circumstances. It may be between 30 working days and three months, excluding term holidays. In determining the length of the monitoring period the principal or 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 monitoring period would normally be extended.

In accordance with the general principles, prior to the commencement of the monitoring period the principal or 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 or manager writes to the employee to provide the details of the monitoring and 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, external professional development, opportunity to observe effective practitioners (this could occur at neighbouring schools), performance counselling and, in relation to teachers, constructive feedback on observations of the employee's classes, team teaching, discussion, time release from scheduled duties for planning purposes. The principal or manager should not be a member of any support group that is established.

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

If a support group is established, the principal or manager will provide advice to the support group members to explain their role and provide them with the reporting requirements.

Monitoring may involve, but is not limited to, the following: direct observation (note that in relation to an employee who works in the classroom, the principal or manager and support group members may attend classes without prior notification), reports provided by appropriate staff, review of employee's records and consideration of student outcomes.

Regular feedback should be provided to the employee during the monitoring period, and this should be documented. Written feedback may also be provided and, if there has been no improvement, the employee should be reminded of the consequences of failing to improve his or her performance.

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

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

Step 3– Decision on progress

At the completion of the monitoring period the principal or manager must assess the performance of the employee and decide on one of the following:

- (a) If the performance of the employee is at or above the required standard, the principal or manager should inform the employee in writing that no further action will be taken.
- (b) Provide an additional warning and additional monitoring period (Step 4).
- (c) If the performance of the employee continues to be below the required standard the principal or manager should prepare a report and refer the matter to the Secretary for a determination under section 2.4.59F of the *Education and Training Reform Act 2006* on whether or not the employee has engaged in unsatisfactory performance) (Step 5).

If the employee's performance continues to be below the required standard the principal or manager will prepare a report for consideration of the Secretary under Division 9A of the *Education and Training Reform Act 2006* and inform the employee of the principal's decision and provide the employee with a copy of the report.

Prior to making this decision, the principal or manager should inform the employee of his or her preliminary view and invite the employee to make a submission in relation to the decision the principal or manager intends to make.

Step 4– Optional– additional warning and additional monitoring period

The principal or manager may provide an additional warning and additional monitoring period to the employee if appropriate in the circumstances. For example, where there is evidence of improvement in some of the standards but not all, or where there is evidence of improvement in all areas cited but the employee still falls below the required standard, the principal or manager may consider that an additional period of monitoring and support is warranted. The additional warning is to advise the employee in writing:

- That his or her performance continues to be unsatisfactory;
- Of the areas of performance which continue to be below the required standard and the required standards;
- Of the consequences of continued failure to meet the required standard (ie 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 an additional monitoring period will be provided (being not less than 20 working days and a maximum duration of three months) for the employee to improve his or her performance to the required standard; and
- Of the details of the period of monitoring and support for this additional period. (Refer to step 2 for guidance).

In determining the length of the additional monitoring period the principal or manager will need to consider the time reasonably required to improve performance in the identified area(s) having regard to the time already provided in the initial monitoring period.

During the course of this monitoring period it is expected that the support provided to the employee will be progressively reduced to allow the employee to demonstrate the achievement of the required standards in the context of the usual professional support available for employees.

The principal or manager should ensure that accurate records of the monitoring period are kept. These records will be important during any subsequent referral to the Secretary or appeal proceedings.

At the completion of the additional monitoring period the principal or manager must assess the performance of the employee. If the performance of the employee is at or above the required standard, the principal or manager should inform the employee in writing that no further action will be taken provided that the employee's performance continues to be at or above the required standard. This letter should be placed on the employee's personal file along with all other documentation.

If the employee's performance continues to be below the required standard the principal or manager will prepare a report for consideration of the Secretary under Division 9A of the *Education and Training Reform Act 2006* and inform the employee of the principal's decision and provide the employee with a copy of the report and any accompanying letter to the Secretary.

Prior to making this decision, the principal or manager should inform the employee of his or her preliminary view and invite the employee to make a submission in relation to the decision the principal or manager intends to make.

Step 5– Secretary’s decision on receiving report

Steps 5 to 7 contain the procedures under 2.4.59B(1)(b) of the *Education and Training Reform Act 2006*.

On receiving a report from a principal or 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 monitoring period is necessary). (2.4.59D(1)(a)).
- (b) Proceed to make a determination on whether or not the employee has engaged in unsatisfactory performance in respect of the employee (2.4.59D(1)(b)). The procedure for making a determination is contained in steps 6 and 7.
- (c) Investigate any or all of the matters in the report under Division 10 (ie where the allegations relate to serious misconduct). (2.4.59D(1)(c)).
- (d) Proceed no further with any of the matters in the report (2.4.59D(1)(d)).

The Secretary will write to the employee to advise that the Secretary has received a copy of the report into the employee’s unsatisfactory performance and will advise the employee of his or her decision under 2.4.59D(1) of the *Education and Training Reform Act 2006* and of the next steps.

If the Secretary decides under 2.4.59D(1)(c) to investigate any or all of the matters in a report under Division 10 (misconduct) the Secretary must not proceed further under Division 9A in relation to any of those matters investigated under Division 10.

Step 6–Notice to employee regarding proposed determination

If the Secretary decides under 2.4.59D(1)(b) to proceed to make a determination on whether or not there has been unsatisfactory performance, the Secretary must first give a notice to the employee in writing advising the employee of the following:

- (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 Secretary’s preliminary view in relation to the matters in the report.
- (c) Of the actions that may be taken by the Secretary under Division 9A (being, 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 Secretary's preliminary view in relation to the matters in the report and the actions that the Secretary proposes to take.

The notice to the employee dealing with the matters listed above is a notice under 2.4.59E of the *Education and Training Reform Act 2006*.

A submission by an employee relating to the report, the Secretary's preliminary view on the report, and the proposed action in respect of the report must be received by the Secretary no later than 14 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 7– Notice to employee regarding actual determination

After giving notice under Step 6, the Secretary may make a determination under section 2.4.59F of the Act as to whether or not there has been unsatisfactory performance by the employee and may take any of the following actions against the employee:

- (a) A reprimand;
- (b) A reduction in the employee's classification;
- (c) Termination of the employee's employment.

In making a determination, the Secretary must:

- (a) Take into account any report received from the principal or manager; and
- (b) Take into account any submission received from employee; and
- (c) Comply with these procedures.

If the Secretary makes a determination, the Secretary must (under section 2.4.59G) give notice in writing to an employee:

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

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

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 members of 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.

Disciplinary Appeals Boards

The [Disciplinary Appeals Boards](#) hear appeals on action taken under Part 2.4 of Division 10 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 Australia

The unfair dismissal provisions of the *Workplace Relations Act 1996* 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 Act and the Workplace Relations Regulations 1996. 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.

Details are available at the Fair Work Australia website: <http://www.fwa.gov.au/>

FURTHER ASSISTANCE

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