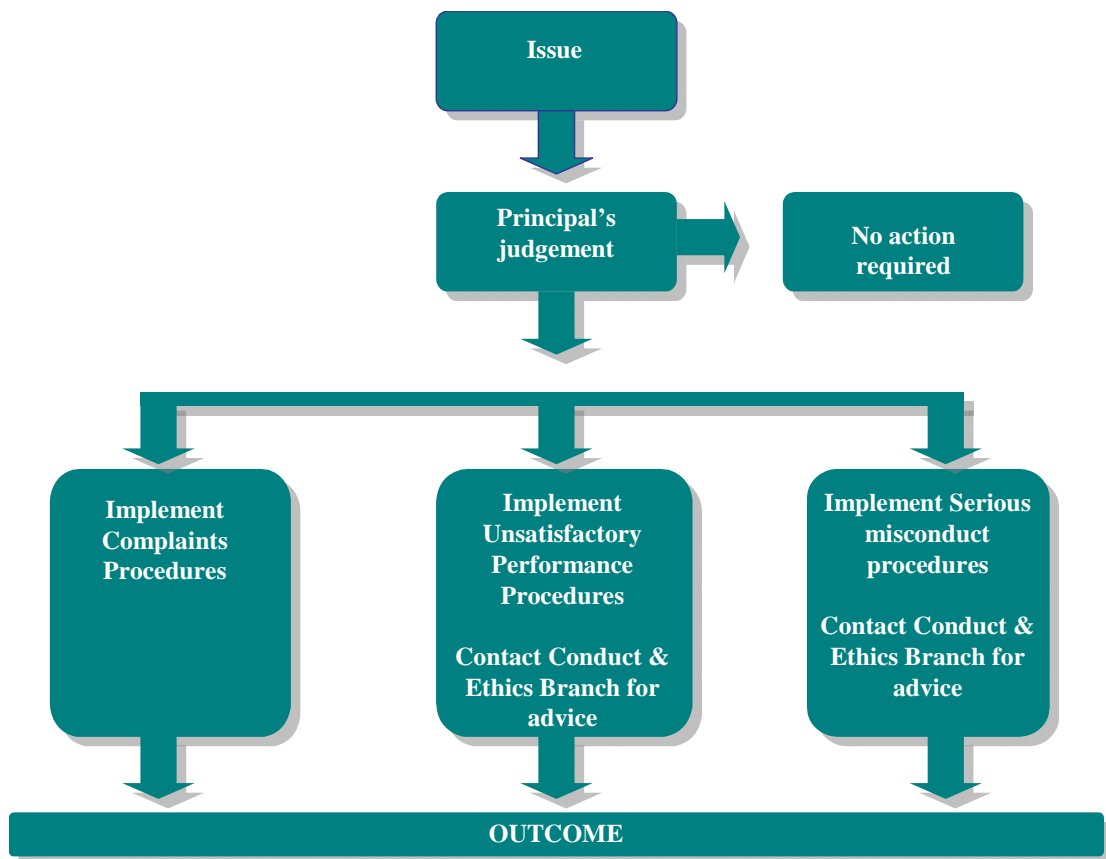


**GUIDELINES FOR MANAGING  
COMPLAINTS, UNSATISFACTORY PERFORMANCE AND  
SERIOUS MISCONDUCT IN RELATION TO**

**TEACHERS**



## INDEX

1. INTRODUCTION .....	4
2. GUIDELINES APPLICABLE TO ALL MATTERS .....	5
Principles of natural justice.....	5
Implementation of procedures .....	6
Support person .....	6
Legal or other representation .....	7
Confidentiality .....	8
Witnesses .....	8
Defamation.....	8
Protection from victimisation .....	9
Whistleblowers protection .....	9
Vexatious complaints.....	9
Documentation.....	10
3. COMPLAINTS PROCEDURES .....	10
Complaints against teachers.....	10
Complaints resolution procedures.....	11
Informal process.....	12
Conciliation.....	12
Formal Process.....	13
Step 1 Investigating the complaint.....	13
Step 2 Making a finding.....	15
Step 3 Determining appropriate action .....	15
<i>Complaint not substantiated</i> .....	15
<i>Complaint substantiated</i> .....	15
Document Management .....	16
4. SERIOUS MISCONDUCT .....	17
Grounds for action under the Teaching Service Act 1981.....	17
Sexual harassment.....	19
Sexual misconduct .....	19
Suspected criminal charges.....	19
Removal from duty .....	20
Serious misconduct procedures.....	20
Step 1 – Local level complaints process .....	20
Step 2 – Nomination of investigator .....	20
Step 3 – Investigation stage .....	21
Step 4 – Investigator to prepare the Notice.....	21
Step 5 - Investigator’s report.....	22
Step 6 - Secretary’s Decision.....	22
Oral hearings.....	23
Notification to Victorian Institute of Teaching.....	24
The outcome of dismissal .....	24

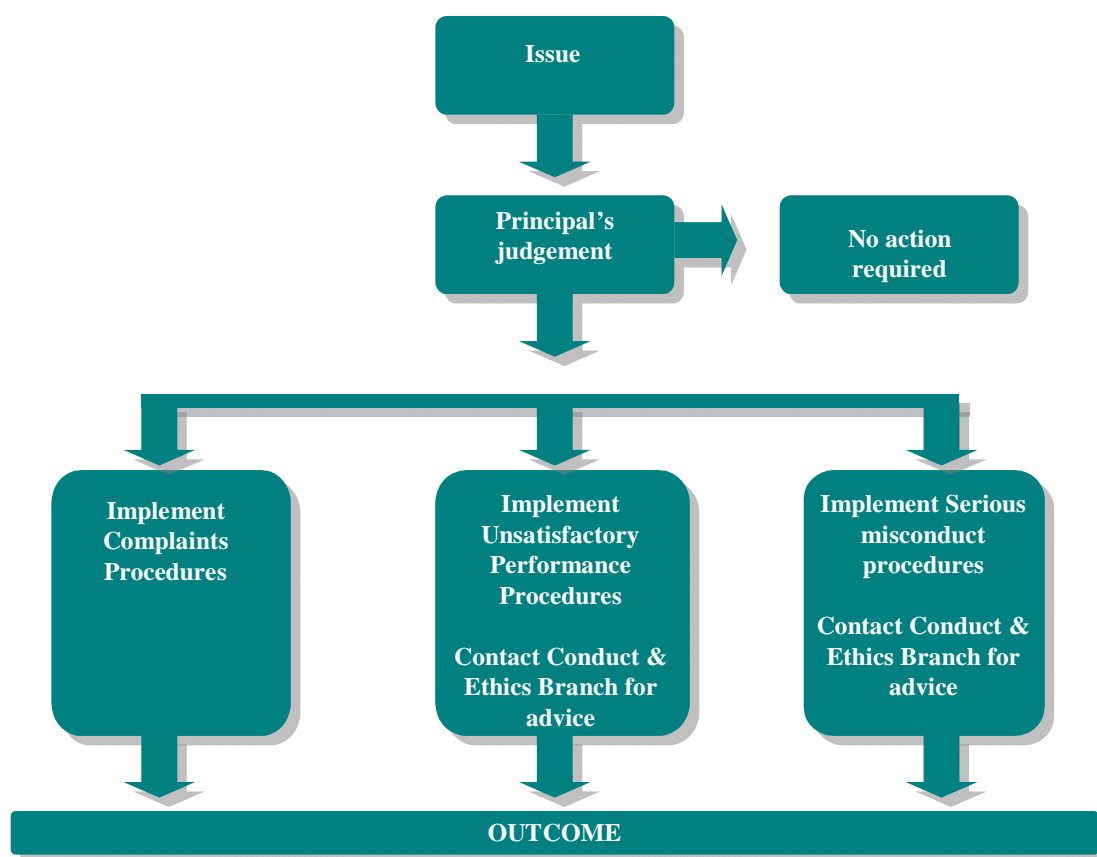
Where dismissal is the outcome determined by the Secretary it must not be based on an unlawful ground. Section 170CK of the <i>Workplace Relations Act 1996</i> prohibits the dismissal of an employee on the following grounds: .....	24
5. UNSATISFACTORY PERFORMANCE .....	24
Examples of unsatisfactory performance .....	25
General principles .....	27
Unsatisfactory performance procedures .....	28
<i>Step 1 – Formal warning to the teacher</i> .....	29
<i>Step 2 – Monitoring and support period</i> .....	29
<i>Step 3 – Decision on progress</i> .....	31
<i>Step 4 - Optional - Additional warning and additional monitoring period</i> .....	31
<i>Step 5 – Inquiry under the Teaching Service Act 1981</i> .....	32
<i>Step 6 - Report to the Secretary</i> .....	33
<i>Step 7 - Secretary’s Decision</i> .....	34
<i>Notification to Victorian Institute of Teaching</i> .....	35
6. RIGHTS OF REVIEW AND APPEAL.....	35
Merit Protection Boards .....	35
Disciplinary Appeals Boards .....	35
Australian Industrial Relations Commission .....	35
Anti-Discrimination Tribunals.....	36

## 1. INTRODUCTION

The Department of Education & Training has a responsibility to ensure that teachers maintain high standards of conduct and performance.

It is incumbent on the principal to act where a complaint, unsatisfactory performance or serious misconduct involving a teacher or assistant principal is observed or brought to his or her attention, whether or not a formal complaint has been lodged.

In these circumstances the principal will need to make an assessment of the appropriate course of action to take as illustrated below



In determining the appropriate action the principal, 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 complaints, unsatisfactory performance or serious misconduct procedures. The Department's Conduct & Ethics Branch will provide advice and assistance 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)

The complaints procedures should be used in relation to less serious complaints involving members of the teaching service. The absence of a written complaint does not prevent the formal complaints process being implemented.

The unsatisfactory performance procedures should be used in relation to unsatisfactory performance. Unsatisfactory performance may ultimately lead to action by the Secretary under *Teaching Service Act 1981*. The serious misconduct procedures are to be applied to a member of the teaching service who is alleged to have committed conduct of a serious nature warranting action by the Secretary under *Teaching Service Act 1981*. The procedures for the management of complaints, unsatisfactory performance and serious misconduct are set out below.

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

In this policy, a reference to teachers includes a reference to assistant principals. A reference to the Secretary includes a reference to the Secretary's delegate.

## **2. GUIDELINES APPLICABLE TO ALL MATTERS**

### **Principles of natural justice**

In the management of complaints, serious misconduct and performance matters, principles of natural justice must be observed. These principles are:

- the right of a teacher 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 teacher to have a support person present during interviews (the role of the support person is defined at page 6)
- the right of each party to a decision maker who acts fairly and in good faith.

Consistent with the *Workplace Relations Act 1996*, the procedures in this policy are 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 into a teacher's performance or conduct.

## **Implementation of procedures**

The implementation of the procedures in these guidelines should:

- support the education and welfare of students ensuring appropriate duty of care is maintained.
- reinforce that the Department will treat 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 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.

A teacher may contact the manager of the Conduct & Ethics Branch where he or she has concerns regarding the implementation of any of the procedures. The manager of the Conduct & Ethics Branch will provide the teacher with advice regarding their concerns as soon as practicable given the circumstances.

### **Support person**

A teacher who is a respondent to a complaints, unsatisfactory performance or serious misconduct procedure may elect to have a support person present at meetings. If the teacher chooses not to have a support person the procedures should still continue. It should be minuted that the teacher declined to have a support person present.

The principal is also entitled to a support person during meetings.

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

Subject to the note below, the support person is to attend meetings as an observer, and is not entitled to participate or represent the teacher in discussions. The support person may not disrupt the process, intervene during the meeting, direct the process or answer questions on behalf of the teacher. If during a meeting between the teacher and the investigator, the support person wishes to comment or provide advice to the teacher, the meeting should be adjourned. Should a support person attempt to intervene, direct the process or represent the teacher, 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.

A teacher may choose his or her own support person who may be a colleague, union/association representative, family member or friend.

It is not appropriate for meetings to be unreasonably delayed due to the unavailability of a teacher's support person. If this occurs, the teacher should be advised to nominate another support person.

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

### **Legal or other representation**

Notwithstanding the above, a teacher who is the subject of a formal inquiry under the Act has the right to have present at any meeting attended by the teacher, a representative capable of providing advice to that teacher. Such a representative may be a lawyer or union/association representative.

The principal is also entitled to a representative during meetings.

The key role of the representative is to provide legal or other advice to the teacher. The representative may not disrupt the process, direct the process or otherwise interfere with the interview. If the representative 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 teacher chooses not to answer any questions during the interview, the investigator/decision-maker may proceed with the inquiry in the absence of any response from the teacher.

## **Confidentiality**

The principal must ensure that appropriate confidentiality is properly observed in relation to the management of any complaint, unsatisfactory performance or serious misconduct procedure. Every effort should be made to respect the confidentiality rights of the teacher involved. However it may be necessary to inform other employees who are involved in the investigation or management of the matter. This should be done as discreetly as possible.

Proper steps should be taken at every stage of the procedures to secure documentation, and all persons involved in the procedures should be advised of the importance of maintaining confidentiality. The use of e-mail or facsimiles as part of the procedures may require particular arrangements to be put in place to ensure confidentiality is not breached.

## **Witnesses**

A teacher may nominate the names of witnesses, including students, who in the teacher's opinion should be interviewed as part of any investigation. On receipt of these names, the principal will determine which, if any, of these people will be interviewed and will contact them directly. The teacher has no right to be present during the interviews. The teacher must not approach witnesses about their complaint, except to inquire whether they would agree to their name being provided to the principal for the purposes of being interviewed. In no circumstances is the teacher to approach a complainant or student in relation to being a witness. The reason for this protocol is to protect the integrity of the investigation and to ensure that there is no intimidation of any witness. A breach of this protocol will be regarded as a serious breach and may lead to action in respect to serious misconduct.

## **Defamation**

Allegations may carry the risk of defamation especially if confidentiality has not been maintained properly. It is not defamatory for an individual to make a complaint in good faith through the proper channels. However, the matter should only be discussed with those who have official 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.

## **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 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 procedures, the principal should make it clear to the persons involved that victimisation is not tolerated and may be dealt with in accordance with the serious misconduct procedures.

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

Victimisation should not be confused with the natural consequences of a properly applied procedure. 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 apply to access the provisions of the Whistleblowers Act 2001. The Whistleblowers Act 2001 defines the types of complaints that may be accepted as complaints under the Act.

The *Whistleblower Protection Act 2001 - Department of Education & Training 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 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 serious misconduct.

## **Documentation**

Documents relating to a complaint, unsatisfactory performance or serious misconduct should be placed by the principal in a sealed envelope marked 'Confidential - Principal only' and filed on the teacher's personal file.

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

Generally only the principal 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 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 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 to view the documents relating to any of the procedures outlined in these guidelines. If this occurs, the Department's Freedom of Information Unit will make a determination as to what documents would be released.

### **3. COMPLAINTS PROCEDURES**

#### **Complaints against teachers**

Complaints against a teacher may arise from:

- unprofessional conduct and/or unsatisfactory performance
- a particular incident
- allegations of unlawful discrimination
- allegations of unlawful harassment, including sexual harassment
- allegations of bullying
- a school practice or policy that a complainant believes is unfair, unreasonable or inappropriate
- decisions made, or not made, that a complainant believes are unfair, unreasonable or inappropriate

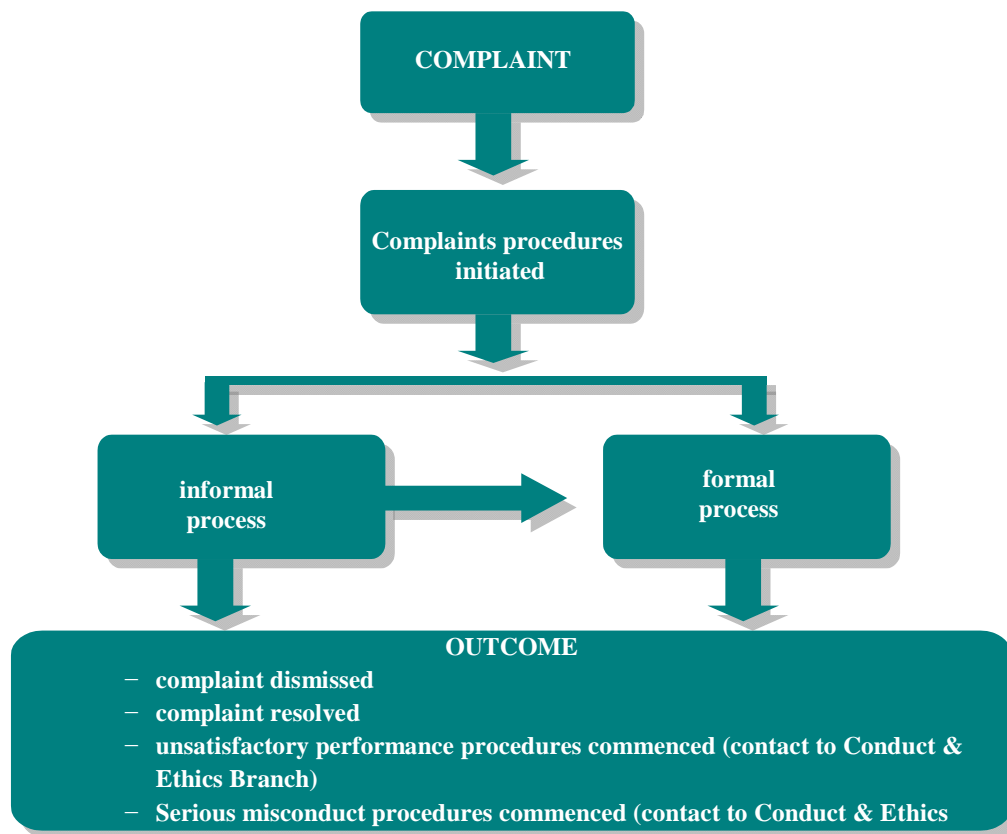
The principal must ensure that a complaint is dealt with in a way that is both procedurally and substantively fair.

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

The principal can provide advice regarding the procedures for making a complaint. It may also be necessary for the principal to allocate responsibility to a suitably trained member of staff to arrange for the provision of advice and support for complaints involving matters such as discrimination, sexual or racial harassment, bullying or victimisation.

## Complaints resolution procedures

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



The complaints resolution procedures encompass both informal and formal action.

Upon receiving a complaint the principal will assess the nature of the complaint and form a view regarding the appropriate course of action. If the matter involves allegations of serious misconduct including sexual harassment the principal must contact the Conduct & Ethics Branch for advice. The principal 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. Many concerns expressed to the

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

### **Informal process**

The principal 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 considers this appropriate in the circumstances
- the complainant wishes to remain anonymous and the principal agrees
- 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 another person, to speak to the teacher on his or her behalf. The principal, or other person, may then privately convey the complainant's concerns, listen to the response of the teacher 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 can be minimal, for example a diary entry and/or retention of a copy of any response provided to the complainant. 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 considers it appropriate, particularly where an informal process has been unsuccessful or new information is received.

### **Conciliation**

Prior to determining the course of action, and where the parties agree to participate, the principal may choose to use a conciliation process, where the principal considers it appropriate and it may assist in achieving a resolution of the complaint.

The object of conciliation is to assist the parties to achieve resolution of the complaint. Whilst conciliation 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 conciliation process may include another person for support and assistance. No party to the conciliation 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 conciliation 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 conciliation 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.

## **Formal Process**

Matters raised directly with the principal 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 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 procedure requires the principal to investigate the complaint to determine whether or not it has substance.

An investigation will involve:

- establishing the precise nature of the complaint. This would normally involve interviewing the complainant and requesting that the complaint be put in writing (where this has not already been provided). Where the complainant declines, or is unable, to provide the details in writing the principal should interview the person and make a record of the interview. Where the complainant advises the principal they wish to remain anonymous, the principal needs to establish why the complainant does not want their identity disclosed. In this respect, the principal will need to manage the concerns of the complainant. In most cases, it is not possible for the complainant to remain anonymous.
- where a complaint has been received, the principal should acknowledge receipt of the complaint in writing.
- meeting with the teacher to inform them in writing of the full details of the complaint and providing the opportunity for the teacher to respond in writing and, where necessary, interviewing the teacher. The letter of complaint should include information regarding who made the complaint and when it was received, the specific allegations, and advice regarding confidentiality.
- providing the teacher with an indicative timeline for the investigation. Where this timeline needs to be varied the principal should advise the teacher.
- 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.
- allowing each party to have a support person present during all meetings as part of this process (the role of the support person is defined on page 6).
- if the principal considers it necessary, providing the opportunity for the teacher to meet with the principal to clarify matters in the response.

*Note: Where a teacher 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. Teachers should be informed of the implications of not responding.*

## **Step 2 Making a finding**

Following the investigation, the principal 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:

- the circumstances and context of the complaint
- whether evidence was presented by the parties in a credible and consistent manner
- the absence of evidence where it should logically exist.

In making a decision, the principal should consider all available evidence. The principal should be satisfied, so far as is possible, of the facts of the situation and make a decision based on this assessment. 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 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 are to find the complaint substantiated or not substantiated.

### ***Complaint not substantiated***

The principal may determine that a complaint does not have substance and dismiss it. In this case the principal 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 determines that a complaint does have substance the principal is to determine the appropriate course of action.

Where the complaint involves serious misconduct including sexual harassment the principal must contact the Department’s Conduct & Ethics Branch for advice regarding the appropriate course of action.

In addition to determining the appropriate action the principal may consider one or more of the following:

- formal apologies (may be verbal)
- 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 teacher's personal file
- implementing a formal period of monitoring
- provision of a mentor
- referral to professional development
- implementing unsatisfactory performance procedures.

Where the complaint raises significant issues in relation to unsatisfactory performance, the principal should implement unsatisfactory performance procedures.

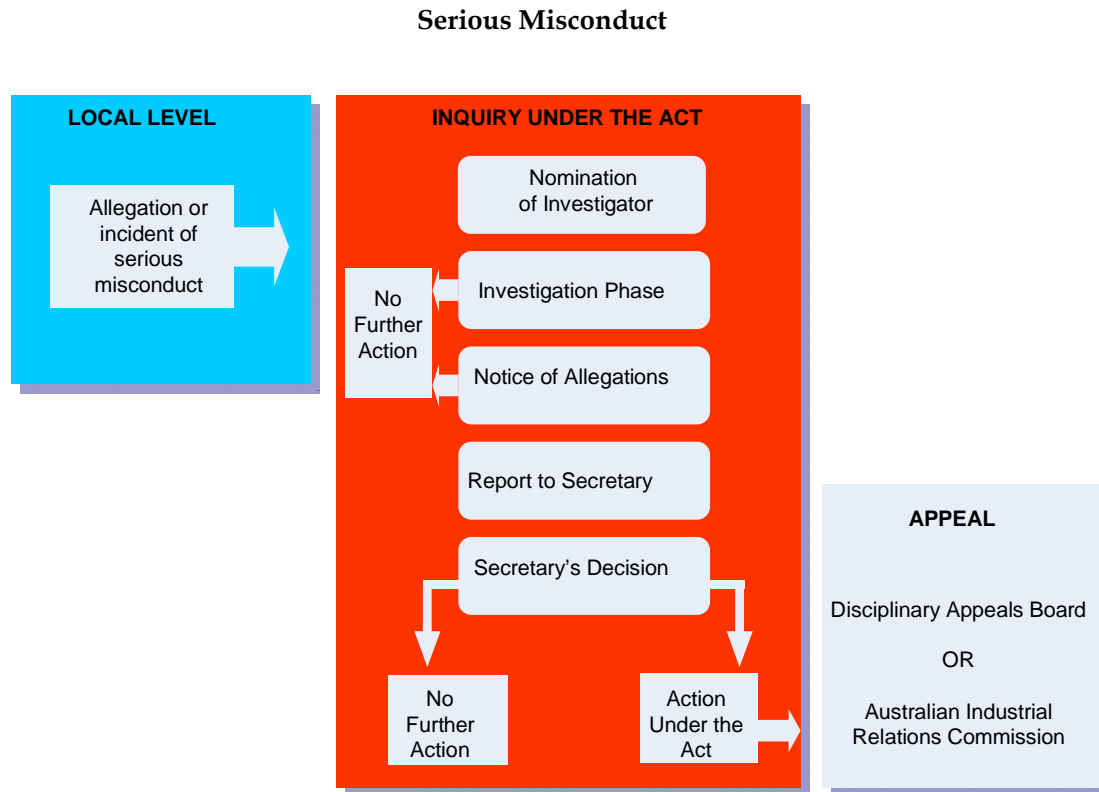
A written response outlining the decision and the reasons for it should be provided to the teacher. A written response outlining the findings should be provided to the complainant.

#### **Document Management**

As soon as possible after making and acting on a decision, the principal should attach a copy of all documentation related to the complaints process to the teacher's personal file (See page 10).

## 4. SERIOUS MISCONDUCT

The Conduct & Ethics Branch must be contacted for advice in all cases of serious misconduct.



Some allegations of serious misconduct will first be handled by the principal at the school level in accordance with the formal complaints procedures (and with advice from the Conduct & Ethics Branch). Where the principal has formed a view that there may be grounds for action under the *Teaching Service Act 1981*, the Conduct & Ethics Branch will, in accordance with the serious misconduct procedures, advise on the next steps.

### Grounds for action under the Teaching Service Act 1981

The Secretary, after investigation, may take action under Part 5 of the *Teaching Service Act 1981* against a teacher 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, inefficient 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 11 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 a officer or 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 officer or employee)."

Examples of the grounds listed above include but are not limited to:

- sexual offences or other criminal offences
- harassment, bullying or victimisation of other staff members, students or the public
- striking a student, other employee or member of the public, or otherwise inflicting harm
- inappropriate relationships with students
- unlawful discrimination
- conduct involving dishonesty, wilful or reckless, loss or damage
- 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
- serious or gross negligence
- behaviour which endangers others
- repeated acts of misconduct

- inappropriate use of the internet or the Department's information technology resources including for example accessing pornography.

Allegations handled in accordance with these procedures may include conduct outside as well as inside the workplace – for example where the teacher has failed to maintain the general standards of conduct required in the Public Sector and the behaviour contravenes the requirements of Teaching Service Order No. 165 which sets out the conduct and duties required of all members of the Teaching Service.

The principal must ensure that any person affected by the alleged misconduct is provided with appropriate support.

## **Sexual harassment**

The Department of Education and Training promotes safe and healthy workplaces free from discrimination and harassment. The Department has a Sexual Harassment Policy in place which sets out the rights and obligations of all persons in the workplace. In relation to complaints of sexual harassment, the Department's **Conduct & Ethics Branch must be contacted for advice**. Sexual harassment, if substantiated, may constitute a ground for action for serious misconduct.

## **Sexual misconduct**

Allegations of sexual misconduct or sexual harassment may also constitute a criminal offence. Alleged sexual offences against children and young persons may have mandatory reporting implications and, where this is the case, the Department of Human Services must be contacted.

## **Suspected criminal charges**

Principals should report suspected criminal conduct to the police, after consulting with the Conduct and Ethics Branch.

Where a teacher is the subject of a police investigation the Department has a responsibility to investigate an allegation even when the police are involved, and to determine appropriate action in terms of the teacher'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.

Where the Victoria Police report to the principal or the principal becomes aware that a teacher is the subject of a police investigation, the principal should immediately contact the Conduct & Ethics Branch.

## **Removal from duty**

If, following **consultation with the Conduct & Ethics Branch**, the principal considers that the teacher's continued presence in the workplace may not be in the best interests of the teacher, other employees, students, or the Department, or if it is otherwise inappropriate for the teacher to remain on duty, the principal may seek approval from the Secretary (or delegate) to remove the teacher from duties at that school in accordance with section 3A of the *Teaching Service Act 1981*.

## **Serious misconduct procedures**

These procedures are established under section 68 of the *Teaching Service Act 1981*.

The role of the Conduct & Ethics Branch is to oversee and provide legal and procedural advice in relation to the serious misconduct procedures which may result in action under the *Teaching Service Act 1981*.

### **Step 1 - Local level complaints process**

Some allegations of misconduct will first be handled by the principal at the school level in accordance with the local complaints procedures.

Where the principal has formed a view that there may be grounds for action under the *Teaching Service Act 1981*, **the principal must contact the Conduct & Ethics Branch for advice.**

### **Step 2 - Nomination of investigator**

Where there appears to be grounds for action under the *Teaching Service Act 1981*, the principal 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 the *Teaching Service Act 1981*. The principal 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 the Act. The role of the investigator is to collect information,

prepare a Notice, seek a response from the teacher and send a report to the Secretary for the Secretary's consideration and action.

In most cases, the Secretary will nominate the principal as the investigator under section 71(1) of the *Teaching Service Act 1981*. In exceptional circumstances, it will be inappropriate 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.

### **Step 3 - Investigation stage**

Once the Secretary has nominated a person as the investigator, the Secretary will write to the teacher to advise that an inquiry under the Act has commenced and inform the teacher of the name of the person who has been nominated as the investigator. The investigator will then write to the teacher to explain the process.

The investigation will involve establishing the precise nature of the allegations and possible grounds for action under the Act. This would normally involve 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 the level formal complaints process.

A teacher may nominate the names of witnesses, including students, who in the teacher's opinion should be interviewed as part of the investigation. On receipt of these names, the investigator may interview the witnesses where appropriate and relevant to the allegations. The teacher has no right to be present during the interviews.

In addition, a teacher may request witnesses other than students to provide statements on his or her behalf. However prior to obtaining the statement from any witness, the teacher must inform the witness of the reason for obtaining the statement, and advise the witness that they are not obliged to provide the statement.

In no circumstances is the teacher to approach a complainant or student in relation to being a witness.

A breach of this protocol will be regarded as a serious breach and may lead to further action in respect to serious misconduct.

### **Step 4 - Investigator to prepare the Notice**

After the investigation phase, the investigator will prepare a Notice, seek a response from the teacher and send a report to the Secretary. The Notice to the teacher must contain:

- the alleged ground(s) for action under section 66 of the Act;
- the particulars of the alleged ground(s).

The investigator will request the teacher to provide a response to the Notice within a suitable time frame (being not less than 14 calendar days).

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

The teacher 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 on page 6).

#### **Step 5 - Investigator's report**

The investigator will consider the teacher's response, should one be provided, and 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 teacher to the Notice;
- all relevant documentary evidence;
- a recommendation either that action be taken by the Secretary under the Act or that no further action be taken.

Where a report is provided to the Secretary, the teacher 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 seven days of receiving the report.

#### **Step 6 - Secretary's Decision**

The Secretary will consider the report provided by the investigator and the teacher's response if provided and will assess the material.

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 teacher 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 teacher (specifying what action is contemplated)

and invite the teacher 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 pursuant to section 71(3) of the Act; or
- take no action.

Where the Secretary finds that there are sufficient grounds for taking action under the *Teaching Service Act 1981*, he or she may –

- terminate the teacher's employment;
- reduce the teacher's classification;
- fine the teacher an amount not exceeding \$5,000;
- reprimand the teacher.

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

### **Oral hearings**

The Secretary may determine, without holding an oral hearing -

- whether there are grounds for action in respect of a teacher; and
- if the Secretary decides that there are grounds for taking action, the action, if any, that may be taken against the teacher.

The Secretary may hold an oral hearing or take the evidence orally, or permit cross-examination, of all or any witness if the Secretary considers it

appropriate having regard to the seriousness of the allegation, any reasons submitted in support of a request for an oral hearing, whether the Secretary considers that an oral hearing would assist in evaluating the information in support of the allegations and any other matters that the Secretary considers relevant.

### **Notification to Victorian Institute of Teaching**

In accordance with section 27 of the *Victorian Institute of Teaching Act 2001*, the Department will inform the Victorian Institute of Teaching of the outcome of any action taken by the Department in response to allegations of serious misconduct, serious incompetence, or lack of fitness to teach.

### **The outcome of dismissal**

Where dismissal is the outcome determined by the Secretary it must not be based on an unlawful ground. Section 170CK of the *Workplace Relations Act 1996* prohibits the dismissal of an employee on the following grounds:

- temporary absence from work because of illness or injury
- trade union membership or participation in trade union activities outside working hours, or, with the employer's consent, during working hours
- non-membership of a trade union
- seeking office as, or acting or having acted in the capacity of, a representative of staff members
- the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities
- race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin
- refusing to negotiate in connection with, make, sign, extend, vary or terminate an Australian Workplace Agreement
- absence from work during maternity leave or other parental leave.

## **5. UNSATISFACTORY PERFORMANCE**

**Principals must contact the Conduct & Ethics Branch when unsatisfactory performance procedures are being commenced.**

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

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

The assessment of the teacher must be against the standards of performance and conduct that are expected of that person at their level in the school. All teachers have set duties which they are required to undertake as part of their role. Established performance and development arrangements provide teachers 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, circumstances may arise where it is necessary to deal with a teacher's performance using the unsatisfactory performance procedures. Principals should address unsatisfactory performance as soon as they become aware of it and not wait until a teacher's annual performance and development assessment is due to raise concerns about a teacher'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 not occur. This applies to classroom teachers (expert, accomplished and graduate) and leading teachers.*

*In relation to assistant principals, remuneration reviews will be deferred during any period that an assistant principal is the subject of unsatisfactory performance procedures.*

## **Examples of unsatisfactory performance**

Unsatisfactory performance includes:

- the negligent, inefficient or incompetent discharge of a teacher's duties
- the failure of a teacher to meet the required standards of performance
- breaches of the requirements of *Teaching Service Orders*
- other conduct or behaviour which in the opinion of the Secretary is unacceptable

Such conduct, either by itself, or in conjunction with demonstrated failure in undertaking the duties of the position satisfactorily or efficiently, may indicate that unsatisfactory performance procedures should be implemented.

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

- *Teaching Service Orders*
- the roles and responsibilities and professional standards in the Victorian Government Schools Agreement 2004
- the school charter codes of practice/conduct
- federal and state equal opportunity and anti-discrimination legislation
- Department policy and procedures.

*Teaching Service Order 165* provides a comprehensive list of the conduct and duties required of all members of the Teaching Service. In summary, members of the teaching service, in the course of their employment, 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
- act impartially
- act with integrity including avoiding any real or apparent conflicts of interest
- refrain from obstructing, preventing or deterring the principal from carrying out his or her duties
- comply promptly with all lawful instructions given to him or her by the principal
- refrain from the consumption of alcohol or dangerous drugs which would adversely effect his/her performance of duties or official conduct
- carry out the duties as required by the principal 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 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**

Consideration of a teacher's performance must be substantively fair. This means that the principal:

- has acted in good faith
- can support the belief that the teacher's performance is unsatisfactory or that the teacher has behaved in an unacceptable way
- has heard from the teacher in respect of the performance concerns and has considered the teacher's response
- has provided opportunity, discussion and support to assist the teacher to reach the required standard of performance
- has determined that, despite support provided, the teacher has not reached the required standard of performance.

As a general principle, it is important that accurate records of meetings are taken, the teacher is provided with copies, and all documentation is attached to the teacher's personal file. (Refer to page 10)

Where a teacher 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 significant 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 factors such as these. Where it is considered that counselling may be appropriate this can be arranged through the

Employee Health Unit on (03) 9637 2367 or (03) 9637 2441 or Fax (03) 9637 2300.

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

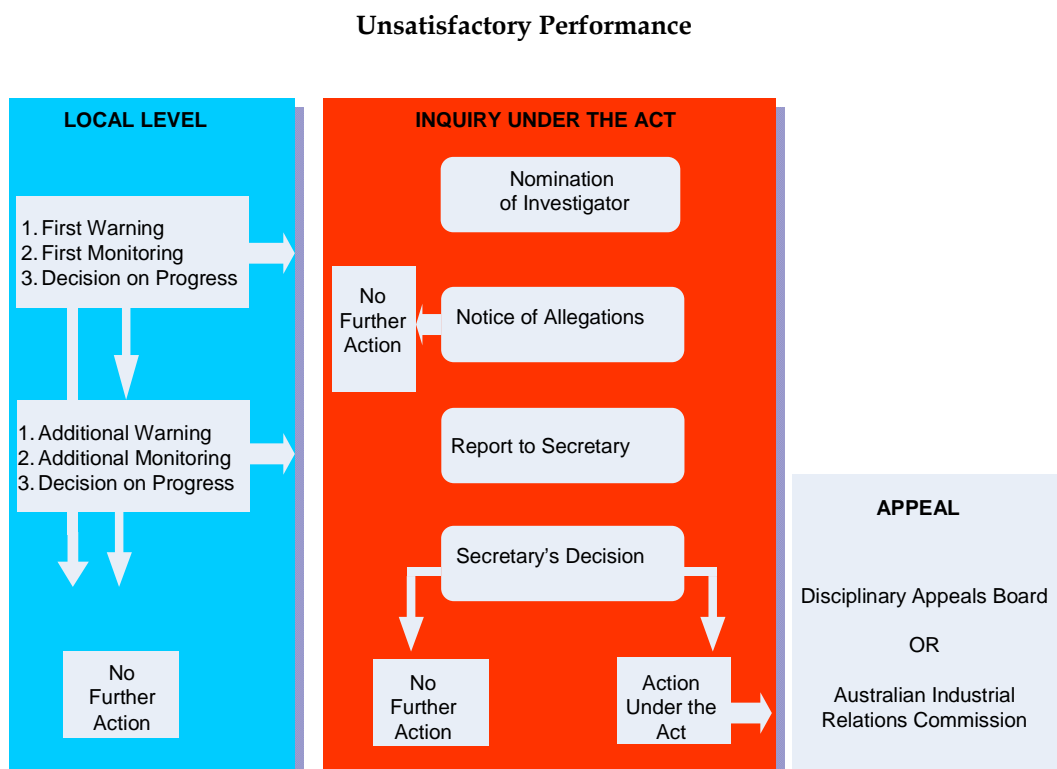
## Unsatisfactory performance procedures

**Principals must contact the Conduct & Ethics Branch when unsatisfactory performance procedures are being commenced.**

A teacher's unsatisfactory performance may give rise to grounds for action under the *Teaching Service Act 1981* on the basis that the teacher is negligent, inefficient or incompetent in the discharge of his or her duties.

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

The unsatisfactory performance procedures are illustrated below:



**Sample letters and reporting documentation supporting these procedures are available from Conduct & Ethics Branch.**

*Step 1 – Formal warning to the teacher*

Where a principal considers that a teacher's performance is unsatisfactory, the principal should advise the teacher in writing:

- that his or her performance is unsatisfactory
- of the areas of unsatisfactory performance
- of the required standard of performance
- of the consequences of continued failure to meet the required standard (that the teacher's unsatisfactory performance may give rise to action under the *Teaching Service Act* 1981 on the basis that the teacher is negligent, inefficient or incompetent in the discharge of his or her duties which may result in dismissal)
- that he or she has three working days (or such longer period as the principal considers reasonable in the circumstances) to explain any reasons for unsatisfactory performance
- that he or she may have a support person present during meetings (the role of the support person is defined on page 6).
- of the existence of these procedures. A reference to where they may be accessed should also be provided.

The principal must provide the opportunity for the teacher to meet and discuss the matters raised in the formal warning.

After consideration of the teacher's response or failure to respond within the period set by the principal, the principal should notify the teacher 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 teacher's personal file), or
- an opportunity will be provided for the teacher to improve his or her performance to the required standard (ie a monitoring period) with appropriate support as outlined below.

*Step 2 – Monitoring and support period*

Where the principal has informed the teacher that an opportunity will be provided to improve his or her performance to the required standard, a

period of monitoring must be set. Depending on the circumstances, the monitoring period would be between 20 working days and three months, excluding term holidays. In determining the length of the monitoring period the principal will need to consider the time reasonably required to improve performance in the identified area(s) and any previous actions taken to support improved performance.

Where a teacher, 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 will:

- detail the support, where relevant, that will be provided to assist the teacher to improve his or her performance and how feedback will be provided
- detail how the performance will be monitored
- establish a schedule of meetings to provide the opportunity to discuss progress, receive advice, support and feedback

Support may involve but is not limited to: establishing a support group, external professional development, opportunity to observe effective practitioners (this could occur at neighbouring schools), constructive feedback on observations of the teacher's classes, team teaching, discussion, time release from scheduled duties for planning purposes, performance counselling.

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

If a support group is established, the principal will provide written 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, direct observation (principal and support group members (refer above) may attend classes without prior notification), reports provided by appropriate staff, review of teacher's records and consideration of student outcomes. The principal may provide written feedback during the monitoring period reiterating the consequences of the teacher failing to improve his or her performance.

Regular feedback should be provided to the teacher, and this should be documented. Where the teacher fails to show improvement he or she should be reminded of the consequences of failing to meet the required standards.

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

The principal should ensure that accurate records of the monitoring period are kept. These records will form part of any report to the Secretary. These records will also be important during any subsequent appeal proceedings to demonstrate procedural and substantive fairness. The principal must provide copies of all documents to the teacher.

### *Step 3 - Decision on progress*

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

- if the performance of the teacher is at or above the required standard, the principal should inform the teacher in writing that no further action will be taken provided that the teacher's performance continues to be at or above the required standard and warning of the consequences of further instances of unsatisfactory performance.
- provide an additional warning and additional monitoring period (Step 4).
- if the performance of the teacher continues to be below the required standard the principal should refer the matter to the Secretary for determination as there may be grounds for action under the *Teaching Service Act 1981* on the basis that the teacher is negligent, inefficient or incompetent in the discharge of his or her duties (Step 5).

Prior to making this decision, the principal should inform the teacher of his or her preliminary view and invite the teacher to make submissions in relation to the decision the principal should make.

### *Step 4 - Optional - Additional warning and additional monitoring period*

The principal may provide an additional warning and additional monitoring period to the teacher if appropriate in the circumstances. For example, where there is evidence of improvement, the principal may consider that an additional period of monitoring and support would enable the teacher to meet the required standard. The additional warning is to advise the teacher in writing:

- that his or her performance continues to be unsatisfactory

- the areas of performance which continue to be below the required standard and the required standards
- the consequences of continued failure to meet the required standard (that the teacher's unsatisfactory performance may give rise to grounds for action under the *Teaching Service Act 1981* on the basis that the teacher is negligent, inefficient or incompetent in the discharge of his or her duties which may result in dismissal)
- that an additional monitoring period will be provided (being not less than 10 working days and a maximum duration of three months) for the teacher to improve his or her performance to the required standard
- 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 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 teacher will be progressively reduced to allow the teacher to demonstrate the achievement of the required standards in the context of the usual professional support available for teachers.

The principal 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 must assess the performance of the teacher. If the performance of the teacher is at or above the required standard, the principal should inform the teacher in writing that no further action will be taken provided that the teacher's performance continues to be at or above the required standard. This letter should be placed on the teacher's personal file.

If the teacher's performance continues to be below the required standard the principal must refer the matter to the Secretary under the *Teaching Service Act 1981*. The principal must inform the teacher of the principal's decision to refer the matter to the Secretary.

#### ***Step 5 – Inquiry under the Teaching Service Act 1981***

Steps 5 to 7 contain the procedures established under section 68 of the *Teaching Service Act 1981*.

Where the teacher's performance continues to be below the required standard, the principal will in consultation with the Conduct & Ethics Branch write to the Secretary to advise that there may be grounds for action under the Act and to recommend the commencement of an inquiry under the *Teaching Service Act 1981*. The principal will not provide to the Secretary any details of the particular matter at this stage.

The first step in an inquiry under Part 5 of the Act is the nomination by the Secretary of a person to draft a Notice of allegations and seek a response from the teacher. The teacher's principal is best placed to do this.

Under the Act, the person who drafts the Notice and seeks a response from the teacher is referred to as the "investigator". The Secretary is required to formally nominate the "investigator" for the purposes of Part 5. As most of the information has already been collected, the role of the investigator in unsatisfactory performance matters is limited to preparing the Notice, seeking a response from the teacher and sending a report to the Secretary for the Secretary's consideration and action.

The Notice to the teacher must contain:

- the alleged ground(s) for action under section 66 of the Act;  
(i.e. in the case of unsatisfactory performance, the ground is "negligent, inefficient or incompetent in the discharge of duties" under section 66(1)(d))
- the particulars of the alleged ground(s);  
(i.e. details of the areas of performance which are below the required standards and details of the required standards)
- the documentary evidence on which the investigator relies to formulate the alleged ground(s) and particulars.  
(i.e. minutes of meetings, copies of correspondence and details of support and monitoring provided)

The investigator will request the teacher to provide a response to the Notice within a suitable time frame (being not less than 14 calendar days).

#### ***Step 6 - Report to the Secretary***

The investigator will consider the teacher's response, should one be provided, and provide a report to the Secretary. The report will include:

- the alleged grounds, the alleged particulars, and the investigator's assessment of the evidence;

- any response by the teacher to the Notice;
- all relevant supporting documentary evidence;
- a recommendation either that action be taken by the Secretary under the Act or that no further action be taken.

Where a report is provided to the Secretary, the teacher 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 seven days of receiving the report.

### *Step 7 - Secretary's Decision*

The Secretary will consider the report provided by the investigator, and any response from the teacher, and will assess the material. 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:

- request the investigator to conduct further investigation and provide a further report to the Secretary pursuant to section 71(3) of the Act; or
- write to the teacher 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 on the basis that the teacher is negligent, inefficient or incompetent; and
  - to take action against the teacher (specifying what action is contemplated)

and invite the teacher 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

- take no action.

Where the Secretary finds that there are sufficient grounds for taking action under the *Teaching Service Act 1981*, he or she may –

- terminate the teacher's employment;

- reduce the teacher's classification;
- fine the teacher an amount not exceeding \$5,000;
- reprimand the teacher.

The Secretary will by Notice in writing advise the teacher 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 27 of the *Victorian Institute of Teaching Act 2001*, the Department will inform the Victorian Institute of Teaching of the outcome of any action taken by the Department in response to allegations of serious misconduct, serious incompetence, or lack of fitness to teach.

## **6. RIGHTS OF REVIEW AND APPEAL**

### **Merit Protection Boards**

The Merit Protection Boards hear reviews of action taken under section 45 of the *Teaching Service Act 1981*. The address is:

- Level 9, 35 Spring Street, Melbourne VIC 3000

### **Disciplinary Appeals Boards**

The Disciplinary Appeals Boards hear appeals on action taken under Part 5 of the *Teaching Service Act 1981*. The address is:

- Level 9, 35 Spring Street, Melbourne VIC 3000

### **Australian Industrial Relations Commission**

The unfair dismissal provisions of the *Workplace Relations Act 1996* apply to all non-excluded Victorian employees on Federal awards and non-Federal award employees who earn up to \$94,900 per annum, indexed annually.

The *Workplace Relations Act 1996* provides a type of review or appeal mechanism for employees who consider their employment has been terminated unfairly or unlawfully. A staff member may lodge an application with the Australian Industrial Relations Commission for relief in relation to termination of employment on the ground that the termination was harsh, unjust or unreasonable or on the ground that it was unlawful (in

contravention of the prohibited grounds). There is a statutory time limit for lodging an unfair dismissal application. Details are available at the Australian Industrial Relations Commission website <http://www.airc.gov.au/>

Note: The effect of section 170HB of the *Workplace Relations Act* 1996 is that an application must not be made to the AIRC on the grounds that a termination of employment was harsh, unjust or unreasonable (or on grounds that include that ground) if proceedings for a remedy in respect of that termination have been commenced at the Disciplinary Appeals Board. This means that a teacher whose employment has been terminated would normally elect whether to make an application to the AIRC **or** appeal to the Disciplinary Appeals Board.

### **Anti-Discrimination Tribunals**

The teacher may also take his or her grievance directly to an external agency, such as the Victorian Equal Opportunity and Human Rights Commission, the Human Rights and Equal Opportunity Commission, or the Ombudsman as appropriate.