ACT PUBLIC SERVICE
GUIDE TO MANAGING WORKPLACE BEHAVIOUR
This guide was developed using material from “Investigating complaints – A guide for investigators” (NSW Ombudsman Office, 2004) and “Managing Poor Behaviour in the Workplace” (Victorian State Services Authority, 2008). Both organisations have kindly afforded permission for the ACTPS to use content from their publications in this guide.
CONTENTS

Introduction  2
Overview  3
Assessing incidents, complaints and allegations  4
Counselling  8
Misconduct  9
Preparing for an investigation  12
Reassignment, transfer or suspension of employees  14
Investigations  16
Disciplinary action and sanctions  22
Criminal charges  25
Right of appeal  26
APPENDIX 1: Relevant principles to adhere to when managing workplace behaviour  30
APPENDIX 2: Tips for managers when discussing allegations with employees  32
APPENDIX 3: Record keeping  33
APPENDIX 4: Useful links  34
APPENDIX 5: Evidence – A quick guide for investigators  36
APPENDIX 6: The role of a support person  38
APPENDIX 7: ACTPS workplace behaviour management flow chart  39
INTRODUCTION

This guide has been developed to assist employees, managers, investigators and delegates in understanding the processes associated with managing inappropriate workplace behaviour set out under ACTPS Enterprise Agreements. These processes must be applied in accordance with the principles of natural justice and procedural fairness, and in a manner that promotes the values and general principles of the ACTPS set out in Section 9 of the PSM Act.

The guide is designed to contribute to fairness, integrity and good public administration in relation to the management of incidents of inappropriate workplace behaviour and/or allegations/complaints of a workplace performance, disciplinary and/or administrative nature.

The guide provides practical assistance to those involved in managing behaviour or employees subject to a complaint, and is intended to help reduce the incidence of employee grievances in relation to managing workplace behaviour by helping to ensure that the related processes are undertaken in a fair and transparent manner. The management of inappropriate workplace behaviour may deliver outcomes that are flawed or unfair if there are deficiencies in the preliminary assessment, investigation or decision-making processes. Findings resulting from these processes have the potential to significantly affect decisions regarding non-disciplinary, disciplinary, or underperformance action. It is therefore essential that the individuals involved in managing inappropriate workplace behaviour understand their roles and responsibilities so as to minimise the chance of a flawed process, which might result in an individual being unfairly disciplined, or alternately, increase the risk that an outcome is overturned on appeal despite its merit.

Directorates are encouraged to provide feedback on this guide to the Public Sector Workplace Relations unit in the Chief Minister, Treasury and Economic Development Directorate (CMTEDD). All comments received will be used to improve future editions of the guide.
OVERVIEW

Managers and employees have a common interest in ensuring that workplace behaviours are consistent with, and apply the values and principles of, the *Public Sector Management Act 1994* (the PSM Act), the Public Sector Management Standards 2006 (the PSM Stds) and the ACTPS Code of Conduct and Signature Behaviours (the Code). The development of an ethical and safe workplace in which managers, supervisors and employees act responsibly and are accountable for their actions and decisions contributes to the overall success of the ACTPS, the generation of high quality work, and the well-being of employees.

All employees have a responsibility to ensure they are aware of, and comply with, the standards of behaviour expected of them. Directorates, through their managers, have a responsibility to support employees in meeting their obligations and to take appropriate action to address behaviour that does not meet the expected standards. There are good reasons for Directorates to ensure their employees act in accordance with established standards, as a failure to do so can have negative consequences for organisational performance, productivity and safety, and public confidence in government administration.

Whether an incident of inappropriate behaviour relates to an employee’s underperformance or misconduct, any action taken to address the issue should focus on the employee’s behaviour; the desired outcome is for the behaviour to cease or improve and not re-occur. Where the seriousness of the behaviour warrants, this may require the termination of the employment relationship - but such cases tend to be the exception, rather than the rule. The objective should be to positively influence the employee’s future behaviour and it is important to start with this objective in mind.
ASSESSING INCIDENTS, COMPLAINTS AND ALLEGATIONS

Managers play a key role in monitoring and managing workplace behaviour and should take action to address inappropriate behaviour or misconduct that they become aware of, without a complaint or allegation having been made by another party. Managers are responsible for:

- the overall management of all employees assigned to their area;
- establishing and monitoring acceptable behaviours and conduct;
- identifying and addressing inappropriate behaviour or minor misconduct when it occurs; and
- identifying and reporting serious misconduct to the delegate or other appropriate persons and/or positions.

On occasion an employee or member of the public may make an allegation or complaint regarding their treatment or what they perceive to be inappropriate workplace practices, which requires assessment. In both cases, Section H (Workplace Values and Behaviours)* of most ACTPS Enterprise Agreements provides a framework for dealing with alleged inappropriate behaviour.

For the purposes of this guide, ‘allegations/complaints’ will be used and assumed to include complaints and/or allegations of, and management observations of, inappropriate behaviour and misconduct.

*Note: ACTPS Enterprise Agreements do not cover all ACTPS employees. For Executives, the provisions that apply are within the PSM Act and the PSM Stds. For officers on probation, eligible casual employees or temporary employees engaged for over six months, the Head of Service may determine that the procedures in Section H (Workplace Values and Behaviours) apply, according to the circumstances of the case.

WHO SHOULD CONDUCT A PRELIMINARY ASSESSMENT?

The most appropriate person to conduct a preliminary assessment is usually the relevant manager. However, in cases where the complainant, or individual subject to a complaint, has a concern about the independence of the manager conducting the assessment, that individual may request that the next level of management within the relevant section nominate an appropriate person (who may be themselves), to complete the assessment. Alternatively, they may raise the matter with the relevant Executive.

WHAT DOES A PRELIMINARY ASSESSMENT INVOLVE?

A preliminary assessment is not an investigation; it is an expedient means of determining if, and how, to proceed with the matter. The assessment should be conducted as soon as possible, be as short as is practical and should cease as soon as it becomes evident how best to handle the issue.

A preliminary assessment may be as simple as reading and considering the allegation/complaint. It may extend to obtaining additional documents or records, talking to the complainant to clarify the terms of the complaint, and perhaps briefly talking to witnesses to
get further information about the allegations. In some circumstances it may be necessary to adopt a more detailed approach, particularly where necessary to identify individuals who may be involved. However, the preliminary process should always be as short as possible and should cease as soon as it becomes evident how best to handle the issue.

The following factors should be considered in any preliminary assessment:

- whether there is sufficient information to determine how to handle the incident/s;
- whether remedial action (e.g. an apology or mediation) is a satisfactory means of redress;
- whether the incident/s should be managed via the Underperformance, Internal Review or Appeal processes within ACTPS Enterprise Agreements;
- how much time has elapsed since the incident/s took place;
- the seriousness of the incident/s and, if proven, potential ramifications for the Directorate and broader ACTPS;
- whether the incident/s implies the existence of a systemic problem;
- whether the incident/s are inconsistent with the obligations of public employees set out in Part 2 of the PSM Act;
- whether criminal conduct may be present;
- if the incident is serious, but the facts are known, whether the matter can be managed rather than investigated;
- whether fraud may be present and the involvement of SERBIR is necessary (see ACTPS Integrity Policy);
- whether other risks are identified (e.g. health and safety of employees, detriment to members of the ACTPS or community, reputation of the ACTPS, security of documents, employees and community members etc); and
- if the preliminary assessment is regarding an allegation or complaint:
  - what the complainants’ expectations are regarding actions and outcomes for themselves and other persons involved; and/or
  - whether the complaint is trivial, frivolous or vexatious.

The following outcomes of a preliminary assessment are possible:

a) if the manager is satisfied that no further action is necessary, no further action need be taken; or
b) if the manager is of the view that counselling or other remedial action is appropriate, the manager should implement that action; or
c) if the allegations are better resolved through the internal review procedures set out in the Agreement or through some alternative mechanism (e.g. as a public interest disclosure), the manager may refer the matter accordingly; or
d) if the manager considers the allegations relate to performance issues, the manager may commence an underperformance process in accordance with H4 (Underperformance); or
e) if the manager determines that the allegations require investigation the manager/supervisor will recommend to the delegate that the matter be investigated under the misconduct and discipline process in H6 (Misconduct and Discipline); or
f) where the manager considers the allegation/s to be vexatious or knowingly false, the manager/supervisor will recommend to the delegate that action may be taken in relation to the person who made the allegations.

In all cases, it is important that:

- action is taken early and in a timely manner; and
- the allegation/complaint, behaviour, or breach is addressed in some way and a record made of any action taken and the reasons for it.

When are Remedial Actions Appropriate?

The preferred approach whenever possible is to resolve the matter through remedial measures, such as:

- mediation, coaching, counselling or mentoring;
- development options – e.g. re-training and education, personal development, increased supervision and action plans to improve performance; and
- employment options – e.g. changes in shift or duties, or transfer to other duties.
When a manager decides to deal with a matter through remedial measures, the employee should be advised of the allegations and the proposed remedial action, and given an opportunity to respond and agree to the proposed action. For example, the employee may agree to attend training or participate in mediation. This way, the employee is more likely to feel that they are part of the decision. If agreement is not reached, or the employee contends that the allegations are false, the manager should consider whether alternative action, such as a disciplinary process, needs to be taken.

Not all allegations can be dealt with through remedial action. Cases involving serious allegations, where there are contested facts, or where non-disciplinary action has been tried in the past but failed, may be more appropriately dealt with through the underperformance or investigation processes outlined in ACTPS Enterprise Agreements.

**WHEN IS UNDERPERFORMANCE ACTION APPROPRIATE?**

It is sometimes difficult to identify when an allegation relates to misconduct and when it relates to underperformance. In broad terms, underperformance amounts to a failure to perform the duties of the position or to perform them to the required standard, including non-compliance with workplace policies, rules or procedures, poor interaction with colleagues. Underperformance is rarely a willful or deliberate act by the underperforming employee.

Underperformance such as this may constitute misconduct if there is an additional degree of willfulness or deliberateness, or if the pattern of underperformance continues despite directions to the contrary.

Borderline situations between misconduct and underperformance may require a more in depth preliminary assessment to gather enough information to determine the appropriate course of action. While resolution via the underperformance process is the preferred course as it gives the employee a better opportunity to learn and to improve, the particular circumstances may warrant discipline action instead.

In the first instance, underperformance can be dealt with through the provision of advice and support and a fair and transparent framework for action to improve the performance in accordance with H4 (Underperformance) of most ACTPS Enterprise Agreements and the ACTPS Performance Framework. In the case of continued underperformance it is suggested that managers seek further assistance from an appropriate Human Resources officer.

**DETERMINING WHETHER AN INVESTIGATION IS NECESSARY**

Depending upon the nature of the matter at hand, investigations are sometimes necessary and appropriate. However, investigations are not a tool to devolve responsibility for managing incidents of inappropriate behaviour, nor should they be used to address minor matters that could be resolved by managerial action of a less formal nature. An investigation simply uncovers all material related to an incident; it does not impose an administrative or disciplinary sanction, which is the responsibility of the relevant manager or delegate. When used to resolve lesser disputes or minor incidents, investigations can unnecessarily delay the resolution of a matter, restrict managerial initiative, and limit the opportunity for open dialogue and apologies between disputing parties.

If the incident is minor, does not appear to amount to misconduct, and there are known facts, the manager can opt to resolve the matter through remedial action such as counselling, training and education, performance management or mediation.

While an investigation and possible disciplinary action should not usually be the first option, there are a number of situations where it is appropriate, for example:

- the alleged behaviour, if substantiated, would be sufficiently serious to justify a sanction as outlined within ACTPS Enterprise Agreements;
- the allegations are serious and there is disagreement about what happened and little prospect of other remedial action being agreed to or being practicable;
• the alleged behaviour is consistent with that which constitutes a criminal act; or
• the allegation/complaint is indicative of a pattern of behaviour by the employee, especially where the employee has been subject to other disciplinary or remedial action for the same kind of matter in the past.

While the same allegations should not be subject to both the disciplinary and underperformance process, in all cases it is appropriate to consider and use remedial options (i.e. counselling, training, etc). A disciplinary process taken in isolation may not assist an employee to understand the standards of behaviour expected of them and what they must do to reach that standard.

**HOW IS THE RELEVANT EMPLOYEE INFORMED?**

Promptly advising an employee that their performance or behaviour is being assessed can help to ensure the employee does not find out through other means that a preliminary assessment is underway. Under Section H (Workplace Values and Behaviours) of ACTPS Enterprise Agreements, an employee should be told that a preliminary assessment is being conducted if it is appropriate to do so. In most circumstances, it will be appropriate to advise the employee of the allegations so that they can provide a response for consideration or comment on any proposed course of action before a decision is made.

Situations where it may not be appropriate to advise the employee include where:

• the preliminary assessment is undertaken quickly and it is impractical to advise the employee;
• there is a reasonable prospect that no further action will be required;
• relationships may be damaged, affecting the opportunity for harmonious operation in the workplace between employees into the future;
• an employee may destroy or remove evidence; or
• the manager believes the allegation/complaint is frivolous, trivial or vexatious.
COUNSELLING

Under previous enterprise agreements, counselling was considered both a matter of management discretion and a sanction that could result from disciplinary action. H4 (Underperformance) of most ACTPS Enterprise Agreements now makes it clear that counselling in relation to an employee’s performance or behaviour may happen at any time, without the need for an investigation.

Counselling should therefore be viewed as a remedial option and a means of improving behaviour or resolving conflict, not a form of discipline. Counselling may take the form of an informal conversation regarding general or minor performance or behavioural issues, or may be undertaken more formally as part of the underperformance or misconduct processes. Regardless of the context in which it takes place, counselling is an action taken by a manager in response to some form of issue, complaint or behaviour, and managers should therefore ensure that they create and retain a written record of all counselling undertaken.

When undertaking counselling as part of the underperformance or misconduct processes, the manager will:

- invite the employee to have a support person or union representative present at the counselling and will allow reasonable opportunity for this to be arranged;
- create a record of the counselling which will include details about the ways in which the employee’s conduct needs to change or improve and the timeframes within which this must occur;
- provide the record of the counselling to the employee and give the employee an opportunity to provide comment before signing the record. If the employee elects not to sign the record any reasons given for refusal should be clearly noted; and
- advise the employee of any consequences of a failure to change or improve their performance or behaviour, such as the commencement of an underperformance or misconduct process.

All parties have an obligation to participate in counselling in good faith.
**MISCONDUCT**

Misconduct occurs when an employee's behaviour is wilfully or deliberately unsatisfactory, breaches their contract of employment, or intentionally fails to meet the requirements of their duties. In the ACTPS, an intentional or reckless breach of employee obligations/standards will amount to misconduct, and includes the following:

a) the employee fails to meet the obligations set out in Section 9 of the PSM Act (this includes bullying and harassment or discrimination);

b) the employee engages in conduct that has, or is likely to, bring the Directorate or ACTPS into disrepute;

c) a period of unauthorised absence and the employee does not offer a satisfactory reason on return to work;

d) the employee is convicted of a criminal offence or a court finds that an employee has committed an offence but a conviction is not recorded, taking into account the circumstances and seriousness of the offence, the duties of the employee and the interests of the ACTPS and/or of the Directorate;

e) the employee fails to notify the Head of Service of criminal charges in accordance with H11 (Criminal Charges); or

f) the employee makes a vexatious or knowingly false allegation against another employee.

Misconduct may justify a warning, demotion, financial penalty or termination of employment, as per H10 (Disciplinary Action and Sanctions) of most ACTPS Enterprise Agreements.

**Example:** James works in a hostel caring for vulnerable clients. Each evening in line with the policy he collects their personal monies to place it in their individual house envelopes. These envelopes are then supposed to be locked away for the individuals. Instead of placing the money in the appropriate envelope, James keeps the money for himself to use for his parking fees.

**SERIOUS MISCONDUCT**

Serious misconduct is misconduct of such a nature that it would be unreasonable or inconsistent for the employer to continue the employee’s employment and usually warrants termination of employment or the suspension of the employee without pay. The ACT Government Solicitor (ACTGS) should be advised of all cases where summary dismissal or suspension without pay is being considered.

Some examples of serious misconduct, as outlined within the Fair Work Regulations 2009, include:

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

Serious misconduct can result from instances not outlined above which are made serious due to the type or nature of employment.

Each case needs to be looked at individually; bearing in mind that what may constitute an act of misconduct or serious misconduct in one work environment may not constitute an act of misconduct or serious misconduct in another work environment.

**ALLEGATIONS INVOLVING CRIMINAL ACTIVITY**

If an allegation of misconduct involves a criminal element, consideration should immediately be given to referring the matter to the Australian Federal Police (AFP).

Note: Any AFP referral must be sent for their consideration of acceptance to investigate.
in alignment with their Case Categorisation Priority Model. Referrals should be addressed to:

The Deputy Chief Police Officer Crime
Winchester Police Centre Belconnen
Corner College Street and Benjamin Way
Belconnen ACT 2617

Directorate Human Resource Management areas and/or the Shared Services Employee Relations team are available to assist with advice on what information is required as part of a referral to the AFP. Delegates should inform ACTGS of all matters of a potentially criminal nature that are being considered for referral to the AFP.

ALLEGATIONS INVOLVING BULLYING, HARASSMENT OR DISCRIMINATION

As per clauses A2.16-19 of most ACTPS agreements, the ACTPS is committed to providing a healthy and safe working environment for its employees. All ACTPS employees are to act in a manner that is consistent with the Work, Health and Safety Act (2011). Bullying, harassment and discrimination will not be tolerated and any allegations will be managed in accordance with Section H (Workplace Values and Behaviours) of most ACTPS agreements.

WHAT IF A FULL ADMISSION IS MADE DURING THE PRELIMINARY ASSESSMENT?

Most ACTPS Enterprise Agreements* provide that:

No investigation may be necessary where the employee fully admits to the alleged misconduct and the employee agrees that there is no need for an investigation. In such cases, the Head of Service may determine the appropriate disciplinary action/sanction in accordance with clause H10. The Head of Service must ensure that they have sufficient information concerning the nature and full circumstances of the misconduct, any mitigating factors, and details of the employee’s prior service record and performance to enable a fair and reasonable determination under clause H10 to be made.

*Note: Not all ACTPS Enterprise Agreements contain this section so it is important to check the relevant Agreement.

Where a full admission is made it should be recorded in writing, including an acknowledgement that the behaviour/incident constituted misconduct, signed and dated by the employee.

Where a full admission is made and the matter does not proceed to an investigation, it is imperative that the delegate determines the following factors prior to imposing any sanctions:

• the nature and seriousness of the misconduct;
• the degree of relevance to the employee’s duties or to the reputation of the Directorate;
• the circumstances of the misconduct;
• mitigating factors, including any full admission of guilt;
• the previous employment history and the general conduct of the employee; and
• whether there is any other relevant evidence which might provide an alternate explanation for the behaviour or actions.

Non-disciplinary approaches (e.g. performance management, counselling, training, mediation) may be the most effective way to manage the matter for instances of inappropriate behaviour, minor misconduct or cases involving personality clashes. However, managers should be willing and able to justify their decision in this regard.

In cases of significant and serious misconduct an investigation may be necessary regardless of whether a full admission is made. In such cases, a level of managerial and delegate judgement is required and Directorate Human Resource Management areas and/or the Shared Services Employee Relations team are available to assist.

BEHAVIOUR OUTSIDE THE WORKPLACE

An employee of the ACTPS must at all times ensure they do not act in a manner that will bring their employer into disrepute. As such, conduct that is apparently unrelated to the performance of an
employee’s duties may amount to misconduct if there is a clear and relevant connection between the employee’s out-of-hours conduct and its effect on the workplace. Of course, this must be balanced against the principle that a public sector employee is entitled to a private life outside of work.

The ramifications of conduct that occurs outside the workplace will depend upon the circumstances of the case, including: the nature of conduct, whether criminal charges arise from it and the employee’s role within the Directorate/ACTPS.

Courts and tribunals have provided guidance as to what behaviour by an employee outside of work is the legitimate concern of the employer. In the most serious cases, termination of employment has been upheld where:

• there was a clear connection between the employee’s out-of-hours conduct and their employment; and

• the conduct was incompatible with the employee’s duty as an employee, or was likely to cause serious damage to the employment relationship.

Example: A criminal conviction for ‘drink driving’, outside the workplace, where the employee is not required to drive a car as part of their duties, is unlikely to be considered a breach of the Code or to trigger misconduct proceedings.

Example 2: Amanda attends a party outside of work. The other party-goers know that Amanda works in a government Directorate, which has had a current major news story hit the headlines. Everyone’s talking about it. Amanda “gets grilled” about what she knows and then reveals confidential information about the issue. Amanda’s manager finds out that she revealed confidential information at the party. Her behaviour appears contrary to the public sector value relating to integrity and to the Code of Conduct in relation to public comment and official information.

Although Amanda’s comments were made outside of the workplace, there would be a sufficient connection between her out-of-work conduct and her employment to justify her manager speaking with her about the incident and, if necessary, taking non-disciplinary or disciplinary action.

As part of normal training, Directorates should provide employees with training on how to conduct themselves appropriately outside of the workplace. It needs to be made clear that inappropriate conduct may result in a breach of Section 9 of the PSM Act. Expected standards of behaviour should also be reinforced before a work-related social function such as a Christmas party.
PREPARING FOR AN INVESTIGATION

If a manager determines that an investigation may be warranted following the conclusion of a preliminary assessment, they will make a recommendation to the Head of Service (delegate). If the delegate is of the opinion that the alleged misconduct cannot be resolved by non-disciplinary measures, they will inform the appropriate Human Resource Manager that an investigation is to take place and make arrangements for an appropriately trained and experienced person (the investigating officer) to complete an investigation in accordance with the relevant ACTPS Enterprise Agreement.

WHO SHOULD INVESTIGATE?

Investigations may be conducted by an employee from within the Directorate’s Human Resource Management area, by the Shared Services Employee Relations team, or by a provider from the ACTPS Administrative Review and Investigations Panel (ARIP). If a Directorate determines to engage an external investigator through ARIP, the Shared Services Employee Relations team should be notified in order to record that an investigation is taking place.

Investigations may be referred to Shared Services Employee Relations by completing a Workplace Investigation or Review Request Form and emailing the form and all relevant documentation to SSHREmployeeRelations@act.gov.au.

The investigator plays a different and distinct role from the Head of Service or their delegate and it is essential that these roles are kept separate throughout the investigation and seen to be free from bias or conflict of interest (real or perceived). The role of the investigator is to undertake a factual investigation to determine, on the balance of probabilities, whether or not the allegations are substantiated. By contrast, the delegate is responsible for considering whether the facts as determined by the investigator constitute misconduct and what disciplinary action, if any, should be taken.

The delegate who determined that an investigation should take place should not also conduct the investigation. For example, if the Chief Executive Officer (CEO) conducts the investigation, then they cannot also act as the delegate who imposes a sanction; it would be more appropriate for an alternative investigator to be arranged. This may have an impact on smaller organisations that have fewer employees with the appropriate delegation to impose sanctions or the necessary experience and training to complete investigations. In these cases, Shared Services or ARIP should be engaged.

In order to avoid any conflict of interest or bias, whether actual or perceived, a delegate may seek advice from their Human Resource Management area or Shared Services Employee Relations as to who the best person to conduct the investigation may be. Directors-General in conflict of interest situations concerning themselves and/or allegations concerning other executive staff may refer a matter to the Head of Service or to the Commissioner for Public Administration.

When deciding whether Shared Services Employee Relations, the Directorate, or an external provider should undertake the investigation, the following issues should be considered:

- the size of an organisation (i.e. a small organisation may find it difficult to appoint an independent investigator from within because the investigator and employee may have a pre-existing professional or personal relationship);
- whether anyone in the Directorate or organisation has the appropriate training to conduct a specialist, expert or complex investigation;
- the capacity and investigative expertise available within Shared Services Employee Relations at the time; and
- the time and resources that will be expended in conducting the investigation.

If there are any concerns about the appropriateness of a potential investigator, it is best to select a different individual.
Importantly, the investigator should not be informed of any prior acts of misconduct on the part of the employee who is under investigation since this may prejudice the investigator’s view of the employee. Prior acts of misconduct will not usually be relevant to the investigation; however they may be relevant to a delegate’s decision regarding an appropriate sanction.

**HOW SHOULD THE RELEVANT EMPLOYEE BE INFORMED?**

As soon as it is decided that an investigation will be conducted, the relevant employee should be notified in writing. The letter of notice should contain the following details:

- Where possible, the complete details of the act(s) of misconduct that the employee is alleged to have committed, noting that the allegations may be further refined during the investigation and the employee will be advised accordingly.
- If possible, why those allegations may, if substantiated, constitute misconduct.
- The sanctions that may apply, including an indication that an employee’s employment may be at risk if the act of misconduct is sufficiently serious.
- Advise who the investigating officer will be.
- Advise who the delegate will be (i.e. who will make the final determination regarding any possible disciplinary or non-disciplinary action).
- Whether the employee is to be reassigned, transferred, or suspended (with or without pay), during the investigation.
- How the investigation will be conducted, including a copy of the Workplace Values and Behaviours Section from ACTPS Enterprise Agreements.
- Advise the employee that they will have an opportunity to meet with the investigator and respond to the allegations, prior to any decision being made as to their veracity.
- Affirm the employee’s right to have a support person or union representative to accompany them throughout all aspects of the process.
REASSIGNMENT, TRANSFER OR SUSPENSION OF EMPLOYEES

As part of deciding that an allegation/complaint should be investigated, the delegate may also need to of the employee is appropriate. Equally, the delegate may decide it is appropriate for the relevant employee/s to remain in their current position until further notice.

Managers/delegates should refer to H8 (Suspension, Reassignment or Transfer) in most ACTPS Enterprise Agreements prior to initiating any of these processes.

WHAT SHOULD BE CONSIDERED WHEN DETERMINING WHETHER TO SUSPEND?

ACTPS Enterprise Agreements provide for employees who are under investigation to be suspended, either with or without pay, if the delegate determines this to be appropriate. When determining whether to suspend an employee, relevant considerations include:

- the delegate being satisfied that it is in the public interest, the interests of the ACTPS or the interests of the Directorate to do so;
- any potential risk to the health and safety of other employees and/or clients;
- any potential for the employee to interfere with the investigation;
- any risk that the misconduct may be continued or repeated; and
- the severity of the alleged act of misconduct.

Suspension with pay may be particularly appropriate where there are allegations of inappropriate interpersonal behaviour or a risk to health and safety, as in such circumstances moving the employee may not be appropriate.

Suspension without pay should only be used where serious misconduct is alleged and where there is a very real possibility that the employee’s employment will be terminated if the allegations are substantiated. The intention to suspend without pay must be discussed between the delegate and the ACTGS.

WHEN CAN SUSPENSION HAPPEN?

Generally, the decision to suspend an employee will be made at the same time as the decision to commence an investigation; however it may also occur during the investigation process. When this happens, it will normally be linked to some further development in the case (e.g. a further act of misconduct), or because substantial new evidence comes to light during the investigation.

WHAT ARE THE RISKS?

It is important for a manager not to prejudge, or be perceived to prejudge, a finding as to whether misconduct has occurred. It is also important for managers to remember that suspension is not a sanction and should not be used as one.

The employee’s welfare and reputation must also be considered before a decision to suspend is made, especially during the investigation stage where no findings of wrong-doing have yet been made. To this end, investigations should be completed as soon as reasonably practicable.

WHAT RIGHTS DOES THE EMPLOYEE HAVE?

Ideally, an employee should be informed of the reasons for a proposed suspension and be given the opportunity to respond before a decision to suspend is made. Where this is not practicable, an employee may be suspended with pay for a short period and then offered the opportunity to provide reasons why the suspension should not continue.

Only in the most serious cases would it be appropriate to suspend an employee without pay without first giving them notice and an opportunity to provide reasons as to why they should not be suspended without pay. An employee who is suspended without pay has the right to appeal that decision under the Appeal provisions in ACTPS Enterprise Agreements.
HOW LONG SHOULD SUSPENSION LAST?

Suspending an employee with pay for a significant period raises governance and probity issues. It is important to remember that public money is being expended on wages without any work being provided in return. Where an investigation is prolonged, it is preferable to transfer the employee to a position where they can be productive – provided this can be done with minimal risk to other workers or the reputation of the ACTPS and/or Directorates – rather than suspend the employee.

The continuation of an employee’s suspension should be reviewed every 30 days unless exceptional circumstances apply. Suspension must end immediately when the organisation no longer believes the employee may have committed an act of misconduct, or as soon as a sanction is imposed or other action is taken.

Note: An employee who is suspended must be available to attend work and participate in the discipline process as directed within 48 hours of the direction being given, unless they are on authorised leave. An employee who is suspended without pay may only access accrued long service leave or annual leave in cases of demonstrated hardship.

IS THERE AN ALTERNATIVE? REASSIGNMENT OR TRANSFER TO OTHER DUTIES

As an alternative to suspension, delegates may decide to temporarily reassign the employee’s duties or transfer the employee to other duties. This enables the employee to work and maintain an effective employment relationship with their Directorate while the investigation is conducted.

Reassignment or transfer may also assist the Directorate to maintain a cohesive and efficient workplace by preventing an employee under investigation from being in a position to tamper with evidence or by separating the complainant and respondent.

If an employee is reassigned or transferred during an investigation, they should not suffer any loss of income during this period consistent with ACTPS Enterprise Agreement provisions covering remuneration whilst suspended with pay.

Example: A shift worker, who normally works overtime and is paid a higher rate for doing so, should not be financially disadvantaged if he/she is re-assigned to duties that do not involve working overtime.
INVESTIGATIONS

The investigation process is set out in H9 (Investigations) of most ACTPS Enterprise Agreements.

WHAT IS THE PURPOSE OF AN INVESTIGATION?

The purpose of an investigation is to examine and evaluate all relevant facts, and to determine whether, on the balance of probabilities, the alleged behaviour took place. An investigation uncovers material related to an incident; it does not result in a sanction or other outcome being imposed on an individual. Rather, the investigation provides the information that can assist the delegate in determining the appropriate sanction, if applicable, to apply at the conclusion of the investigation.

TERMS OF REFERENCE

The exact nature of the investigation will impact issues such as the resources that will be needed, the authorisation necessary to undertake the investigation and possible outcomes of the investigation. It is therefore important to quickly establish the scope and focus of the investigation, including:

• the nature and seriousness of the alleged misconduct being investigated;
• whether it has occurred in the past or is still occurring; and
• whether there are any known witnesses, documents and/or physical evidence to support the allegations.

Understanding these factors will enable the terms of reference for the investigation to be drafted, which will define the boundaries of the investigation and identify relevant, realistic and achievable objectives.

An investigation can be concluded when the terms of reference have been fulfilled.

Where investigations are referred to Shared Services Employee Relations an induction meeting with the delegate will be organised prior to commencement of the investigation, as it is extremely important that the investigator has an understanding of the relevant business unit and of how serious the matter is to the delegate if the allegations were substantiated.

At this meeting, the terms of reference will be discussed directly with the delegate to ensure that the investigator has a complete understanding of what is required and what is involved in the particular matter. It is also an opportunity for the investigator to canvass any other concerns or information, or note issues which may cause delays to the process, directly with the delegate.

REQUIREMENTS FOR THE INVESTIGATOR’S CONSIDERATION

ACTPS Enterprise Agreements require the investigator to:

a) inform the employee in writing of the particulars of the alleged misconduct and details concerning the investigative process; and
b) give the employee a reasonable opportunity to respond to allegations, in writing and/or at scheduled interview, before making a finding of fact; and
c) provide the employee with at least twenty four hours written notice prior to conducting an interview, and advise the employee if the interview is to be recorded electronically; and
d) advise the employee that the employee may have a second individual present during the interview, who may be the employee’s union representative or another individual acting as a support person, and reasonable opportunity for this to be arranged will be allowed for; and
e) as soon as practicable take any further steps considered necessary to establish the facts of the allegations; and
f) provide a record of the interview to the employee to correct any inaccuracies in the record and to provide any further response relative to the allegations before signing the record. If the employee elects not to sign the record, then details of the offer will be noted; and
g) provide a written report to the Head of Service setting out the investigating officer’s findings of fact; and
h) after providing the employee (respondent) with the substance of the allegations and inviting them to an interview to respond, the investigator must allow a reasonable opportunity for the individual to respond to the allegations.

**WHAT PROCESS SHOULD THE INVESTIGATOR ADOPT?**

The first step for an investigator after reviewing the terms of reference and information sent as part of the investigation referral is to formulate an investigative plan. An investigation plan is as critical as the terms of reference and allows an investigator to determine that they are on the correct path.

As part of planning for an investigation, the order of the investigation should be considered. Whilst there may be occasions where the order changes to accommodate extenuating circumstances, the order in which an ideal investigation is conducted is as follows:

1. Obtain a detailed complainant statement.
2. Undertake a site inspection where relevant.
3. Review all documentary evidence.
4. Obtain witness statements (interviews).
5. Interview the respondent.
6. Review and analyse all material/evidence obtained during the investigation (this may include documentary and physical evidence, or require visits to relevant locations).
7. Conduct further investigation as required.
8. Prepare a report, including findings of fact, for the delegate.

Whichever way an investigator conducts an investigation, it is important that the investigator obtains sufficient evidence and facts in order to make a finding on the balance of probabilities. Investigators should only take into account relevant information, and any conclusions reached should be logically formulated. To this end, investigators need to ensure that the employee and all key witnesses provide all relevant information.

The decision to follow up witnesses or consider additional material put forward by an employee is to be made by the investigator in the context of the requirement to ascertain, as far as possible, the truth of the allegations.

**Note:** More information for investigators on the nature of evidence is included at Appendix 5.

**HOW MUCH TIME DOES AN INVESTIGATION REQUIRE?**

Shared Services Employee Relations have developed an Investigation Categorisation model which provides three categories of investigations: Category 1, 2 and 3. Cases are categorised dependant on the nature and seriousness of the allegations, with a projected timeline of between 21 and 95 days to resolve.

This model is a guide only, developed as a best case scenario with no delays in process. The duration of an investigation will largely depend on the complexity and seriousness of the allegations, the need to engage an external investigator or expert, the availability of support people and the availability and number of witnesses to interview.

The duration of an investigation can also be affected by the need to comply with the requirements of natural justice, which require that the employee be given a ‘reasonable opportunity’ to respond and opportunity to obtain a support person or union representative. In most situations, the more serious the allegations, the more reasonable it would be to provide the employee with extra time. Importantly, a ‘reasonable opportunity’ is not necessarily what the employee under investigation believes to be reasonable; it is determined by an objective standard of what a prudent person would believe is reasonable within the circumstances.

The taking of extended sick leave by the employee under investigation may also inhibit the progress of the investigation. Dependent on the nature of the employee’s illness, investigators may request additional medical evidence to establish whether it is reasonable to postpone or progress an investigation in the circumstances.
Investigators and delegates should also be alert to foreseeable delays, such as holiday breaks, and take appropriate action if it is likely there will be delays in the investigative and decision-making process. This may include:

- written notification to the parties concerned about the delay, and the proposed or revised timing for dealing with the matter;
- provision for interim support and contact for the parties; and
- offering reassignment of duties or transfer to one or more of the parties, pending the outcome of the investigation.

When conducting an investigation, investigators and delegates should always consider the impact of any delay on the:

- fairness of the process;
- affected workplace and complainant; and
- welfare of the employee who is the subject of allegation, especially if the employee has been suspended.

**WHAT IF THE MISCONDUCT IS A CRIMINAL ACT?**

The timeliness of an investigation may be affected if there are criminal proceedings in progress that relate to an employee’s conduct in the workplace and/or to private actions outside of the workplace. Directorates can face difficult judgments when misconduct proceedings interact with criminal proceedings, including whether or not to commence an investigation at the same time as the criminal process.

If a credible allegation is made against an employee that involves criminal conduct, immediate and urgent advice should be sought from the ACTGS. This should be through the relevant Directorate Human Resource Management area, who will consider liaising with the police or other investigating bodies and the prosecuting body so as not to jeopardise or prejudice the criminal proceedings.

ACTPS Enterprise Agreements also provide that being convicted of a criminal offence may itself constitute misconduct and grounds for disciplinary action, including termination of employment, where that conviction adversely affects the interests of the Directorate or the ACTPS. These provisions permit the commencement of a disciplinary process upon the employee being charged, including a right to suspend the employee, but any sanction will ordinarily be postponed pending the outcome of the criminal proceeding and a statement from the employee about those proceedings. This is the preferred course of action when the matters under investigation are not closely connected to work.

**AFFORDING PROCEDURAL FAIRNESS**

Due process must be observed in every investigation. Any decision affecting an individual that has been made without affording that individual procedural fairness is liable to be challenged and set aside. In broad terms, procedural fairness requires an employer to:

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

There are limited circumstances where there may be an overriding public interest in short-circuiting certain procedural fairness requirements. These occasions are rare and normally involve serious risks to personal safety or substantial amounts of public funds.

**MAINTAINING CONFIDENTIALITY**

Managers, investigators and delegates must endeavour to maintain confidentiality throughout the complaint management process and investigation, including informing all witnesses of their obligation...
to keep details of the investigation confidential.

Maintaining confidentiality:

- minimises the risk of harm to the parties to a complaint/allegation;
- is the most effective protection available to a whistleblower;
- reduces the opportunities for evidence to become contaminated;
- encourages witnesses to be forthcoming in their evidence; and
- protects the investigator from the possibility of an action in defamation.

It should be noted that there are occasions where evidence may be obtained by third parties, such as when action is taken in the Fair Work Commission or the Courts. Witnesses should be advised of this before they provide any evidence.

**OBLIGATIONS OF THE EMPLOYEE UNDER INVESTIGATION**

Employees are obliged to cooperate with a lawful and reasonable disciplinary process.

An employee who is the subject of an investigation may be directed to attend an interview with the investigator for the purpose of being advised of the process and given the opportunity to respond to the allegations. The employee must be advised in advance of the time scheduled for the interview and be given an appropriate amount of time to prepare and, if they wish, to arrange for a support person or union representative to be present.

The employee subject to investigation may choose not to answer some or all questions, or they may prefer to answer questions in writing after the interview has taken place. They may also wish to add further information in the days after an interview, which is acceptable. It is important that employees attend the scheduled interview, even if they choose not to respond to questions or to later respond in writing, as this allows the investigator to fully inform them of the process and address any questions that the employee may have.

The employee’s obligation to cooperate and participate in the investigation in good faith does not mean that a failure or refusal to answer questions will necessarily amount to misconduct. In particular, an employee cannot be directed to answer questions where the answer may expose them to criminal prosecution or a civil penalty (this is the right against self-incrimination), and an employee may reasonably decline to participate if they are not properly aware of the allegations against them. If an employee refuses to answer any or all questions, they should be advised that in the absence of any evidence provided by the employee, the delegate will make a determination based upon what other facts or evidence come to light through the course of the investigation.

Employees involved in an investigation should be advised that dishonesty could result in further disciplinary action being taken.

**INTERVIEWING WITNESSES AND THE RELEVANT EMPLOYEE(S)**

The quality of the evidence obtained from interviews depends to a large extent on the interviewing skills of an investigator. Apart from a thorough knowledge of the Directorate and its policies, practices and procedures, the keys to successful interviewing are good analytical and communication skills, a high degree of commonsense and sound judgment, professionalism and integrity.

Preparation is an essential element of interviewing. The planning of an interview, with a clear idea of what it is that the interview is intended to achieve, will enable the interviewer to set the agenda for the interview.

The circumstances of each individual case often require an adaptation of the standard interview process. For example, the seriousness of the allegations under investigation and the degree to which the facts are in doubt will assist in determining who to interview and how many people to interview. Where the allegations are serious, all relevant witnesses should be spoken to; however where there are many reliable witnesses, the investigator may determine that additional evidence is not needed.
The location of interviews should be considered, as witnesses may not wish to be seen speaking with an investigator in the office. Further, where witnesses are students or other vulnerable persons, consideration should be given as to whether the evidence of others may be sufficient. For interviews where the individual has limited English-speaking skills, or who has a disability that affects their comprehension or communication, consider using an interpreter. Note that the use of an interpreter does not forgo the right of the witness to have a support person or union representative present.

In general, the last person to be interviewed should be the individual subject to the investigation. These individuals may prefer to respond in writing rather than attend an interview and this should be considered by the investigator. However, as earlier mentioned, they should always meet with the investigator at least once in order to have the process explained to them and be given an opportunity to ask questions.

Individuals subject to an investigation should be given a reasonable period of time to arrange for a support person, who may be a union representative, to be present at the interview, if they so wish (see Appendix 6 for more information on the role of a support person).

To ensure accuracy, interviews may be recorded or a witness statement or record of interview may be prepared. The more likely it is that the record will be used as evidence, the more important it is that a full transcript or fully signed witness statement be prepared.

If a witness is determined to be uncooperative, then in the absence of any legal powers of coercion, an investigator has limited redress. Where the witness is an employee, a failure to respond to questions posed at the interview may amount to a failure to comply with a lawful direction or be a breach of an employee’s common law obligation of fidelity to his or her employer. However, employees may have reasonable reasons for declining to answer questions and legal advice should be obtained before taking disciplinary or other action against an employee on this basis.

**DOCUMENTARY EVIDENCE**

Documentary evidence is an important and usually reliable source of information available to an investigator. One of the first steps an investigator should take is to secure originals of any relevant documentary evidence. This will preserve the evidence and prevent any attempts at tampering with the documents. A record should be kept on the investigation file noting when, where and how documents were obtained.

**GRANTING ACCESS TO DOCUMENTS RELATED TO THE INVESTIGATION**

An investigator must be aware of any statutory rights of access that the person being investigated may have (e.g. under the Freedom of Information Act 1989, the relevant disciplinary provisions of an Enterprise Agreement, or through Court processes should the matter become litigious), as well as any statutory exemptions that apply. Where no statutory guidance is available an investigator must make a careful judgment based on the following competing interests:

- the right of the person being investigated to know the case against them;
- the wish of any third party (especially whistleblowers) to have their identity remain confidential; and
- the general interest in ensuring the integrity of the investigation.

**INSPECTING A SITE**

Sometimes a proper understanding of the issues will require a site inspection. In many circumstances, site inspections can provide visual information and context to a complaint.

**THE BALANCE OF PROBABILITIES**

The task of the investigator is to make findings of fact. However, the investigator may also make a finding on the balance of probabilities. This requires that the investigator be reasonably satisfied that the facts are correct.

The *standard of evidence* required for an investigator to be ‘reasonably satisfied’ regarding a finding of fact will vary according to the seriousness of the
allegations, the inherent unlikelyhood of the allegation being true and the consequences for the employee if they are substantiated.

Investigators should exercise a high degree of rigour in ensuring that the best evidence available is obtained.

**PREPARING AN INVESTIGATION REPORT**

Upon concluding an investigation a report must be prepared for the delegate, which serves as the Directorate’s record of the investigation, evidence obtained and findings of fact.

The report may be reviewed by an Appeal Panel, the Fair Work Commission, Ombudsman, police or court. It may also be publicly questioned by anyone whose interests are adversely affected by the findings. It is therefore especially important to ensure the report:

• is objective;
• uses inclusive language;
• ensures that claims are supported by facts and that these facts are contained within the report; and
• is clear, precise and concise.

Further detail on the Standards for conducting investigations is located within the following document: *Standards for the conduct of inquiries and investigations for ACT Agencies.*

Where an investigation has been referred to Shared Services Employee Relations, an exit meeting will be arranged between the investigator and the delegate upon conclusion of the investigation. After reading all material provided by the investigator, the delegate may request that the investigator provide further information to assist them to make a fully informed decision. This may require the investigator to undertake further inquiries or to conduct further interviews.

Note: No individual can have the investigation report altered simply because they do not like or agree with the content. The investigation is an independent process designed to present a balanced view of the facts in order to provide fairness, integrity and legitimacy to the process and parties involved.
DISCIPLINARY ACTION AND SANCTIONS

POST INVESTIGATION – THE DECISION MAKING ROLE

The majority of administrative decisions that affect employees and organisations are made by delegates, who are usually front line individuals in ACTPS Directorates. Each Directorate determines their own delegation of powers under the ACTPS employment framework (i.e. the PSM Act, PSM Stds and Enterprise Agreements). A proposed delegate must ensure they hold appropriate delegated powers in relation to misconduct, discipline action and sanctions prior to making any decisions.

A delegate makes a decision in their own right, not on the behalf of the Head of Service. A delegate must carefully consider the report and ensure that they are satisfied with the investigator’s procedures and findings before using it to inform their own decision making processes.

Fundamental to sound decision-making is a delegate’s insight of the legal and administrative framework in which decisions are made. A decision-maker is obliged to ensure they understand the relevant rules, framework and processes associated with assessing allegations/complaints and investigative methodology before making decisions to ensure they understand what is required of them and why.

On occasion, decisions may be reviewed by way of internal review, appeal, the Fair Work Commission, Ombudsmen, courts or tribunals.

WHAT HAPPENS AFTER THE DELEGATE RECEIVES AN INVESTIGATION REPORT?

After considering the investigation report, the delegate will make a determination on the balance of probabilities as to whether misconduct has or has not occurred. This means that the delegate must:

a) consider the investigation report, and whether they are satisfied that the factual determinations in the report are supported by the evidence; and

b) if those factual findings are accepted, determine whether those facts constitute ‘misconduct’ within the meaning of the term in the enterprise agreement; and

c) if satisfied that the employee has engaged in misconduct, decide on the most appropriate course of action; and

d) inform the employee of the decision and reasons for the decision.

Consistency across government in the procedural approach to investigations and the rights afforded to employees is important. However, in all cases the circumstances of the employee and the nature and requirements of their working environment will need to be considered when determining the appropriate sanction.

If the delegate determines that misconduct has not occurred, the delegate will notify the employee of their finding in writing (outlining the decision and reasons for the decision) and advise that no sanctions will be imposed.

SHOULD A SANCTION BE IMPOSED?

Not every finding of misconduct will justify a sanction. If the employee’s response to the investigation satisfies the delegate that a repetition of the behaviour is unlikely, the delegate may determine that a non-disciplinary option (i.e. mediation, counselling) is more appropriate.

In the event that the delegate determines to impose a sanction, this can only occur after it has been established that misconduct has occurred.

WHAT TYPES OF SANCTIONS ARE THERE?

Delegates may impose one or more of the following sanctions prescribed within ACTPS Enterprise Agreements:

a) a written warning and admonishment;

b) a financial penalty which can:
i) reduce the employee’s incremental level;  
ii) defer the employee’s incremental advancement;  
iii) impose a fine on the employee;  
iv) fully or partially reimburse the employer for damage wilfully incurred to property or equipment;  
v) removal of an SEA/ARIn benefit.

c) transfer the employee temporarily or permanently to another position at level or to a lower classification level; or

d) terminate the employee’s employment.

Sanctions imposed under these procedures must be proportionate to the degree of misconduct concerned.

A reduction in classification/level or transfer to a different position may be appropriate if it will assist an employee to improve their performance and may sometimes be a better option for an employee rather than termination. This is especially the case for an employee who, despite genuine efforts, cannot fulfil the requirements of a role in a certain position (e.g. the person may perform well on a technical level but cannot remain in a management position).

A delegate should not transfer an employee to another section within an organisation simply to punish the employee. This has no value in terms of managing the employee’s behaviour and may simply pass the problem onto someone else, thus perpetuating the problem of the employee’s unsatisfactory behaviour.

CONSIDERATIONS WHEN DETERMINING THE APPROPRIATE SANCTION

When determining the appropriate sanction, the delegate should keep in mind the broader principles and objectives of managing employee misconduct, such as:

• correcting an employee’s behaviour, rather than punishing an employee;  
• encouraging employees to achieve and maintain standards of conduct consistent with the ACTPS values and employment principles;  
• protecting the integrity of the public sector and maintaining public confidence in government administration; and  
• striking an appropriate balance between the needs and rights of employees, the organisation, and the public interest.

Under ACTPS Enterprise Agreements, the delegate must consider:

a) the nature and seriousness of the misconduct;  
b) the degree of relevance to the employee’s duties or to the reputation of the Directorate or the ACTPS;  
c) the circumstances of the misconduct;  
d) any mitigating factors, including any full admission of guilt; and  
e) the previous employment history and the general conduct of the employee.

The delegate may also consider:

• whether the behaviour was an isolated incident or whether the behaviour (or similar behaviour) has occurred previously;  
• the length of the employee’s service;  
• the skills, experience and position held by the employee;  
• whether the employee was aware of the required standard of behaviour that has been breached, and the consequences of breaching it;  
• the impact of the sanction on the employee;  
• how other employees have been treated in similar circumstances;  
• whether there is an ongoing risk to the public, clients or work colleagues; and  
• relevant evidence which might provide an alternate explanation for the behaviour and/or explanations for the actions, including from the respondent and other parties.
WHAT NEEDS TO HAPPEN BEFORE A SANCTION IS IMPOSED?

Prior to imposing a sanction, ACTPS Enterprise Agreements require that the Head of Service (delegate) advises the employee in writing of:

a) the decision that misconduct has been found to have occurred;
b) the reasons for arriving at this decision;
c) the sanction proposed; and
d) the period during which the employee has to respond to the proposed disciplinary action (which must be a minimum of 14 calendar days).

The advice should also include any mitigating factors that have been, or will be, taken into account.

Once the employee’s response (if any) is received and has been considered, the Head of Service (delegate) may decide if the information provided warrants a reconsideration of the proposed sanction. If not, the delegate may determine to impose the propose sanction. The delegate will inform the employee in writing of:

a) the final decision regarding disciplinary action to be taken;
b) the date of effect and/or, if relevant, the cessation of the action; and

c) the appeal mechanisms that are available under ACTPS Enterprise Agreements.

REASONS FOR THE DECISION

Providing reasons for a decision is one of the basic principles of natural justice and a fundamental aspect of the administrative review process. There is a general common law obligation to provide reasons for a decision. There is also a statutory obligation to do so where an Act states that a person may be adversely affected by an administrative decision. Providing a statement of reasons enables the delegate to explain and defend their decision if necessary, and assists delegates to reflect more carefully on their task and be diligent in decision making. For the individual in receipt of the statement, it provides them with the opportunity to have the decision properly explained and helps them determine whether they wish to seek a review or appeal and on what grounds.

For these reasons, providing a statement of reasons for delegate decisions (and any associated sanctions), is an essential part of the post-investigation process.

There is no universal pro-forma sheet for preparing a statement of reasons. The language used and the length of the statement should be appropriate for the audience and is dependent upon the nature, importance and complexity of the issues at hand. In general, the statement should include:

- a decision as to whether the employee has engaged in misconduct and the nature of that misconduct;
- the reasons for the decision;
- a statement about the evidence relied on;
- findings on the facts that arose, including inferences drawn from those facts;
- whether, in relation to the facts, the evidence was accepted or rejected – where the evidence is conflicting, reference should be made to the available evidence and why certain evidence is preferred or given more weight; and
- any rights of the person affected, including any rights of objection, review or appeal.

The statement of reasons must go further than to simply state conclusions; the actual reasons for those conclusions must also be clear. This may include reference to relevant policy statements and guidelines, or Directorate/ACTPS practices taken into account.
CRIMINAL CHARGES

Under ACTPS Enterprise Agreements an employee must advise the Head of Service in writing of any criminal charge laid against them in circumstances where a reasonable person would believe that the interests of the Directorate or the ACTPS may be adversely affected, taking into account:

a) the circumstances and seriousness of the alleged criminal offence; and

b) the employee’s obligations under Section 9 of the PSM Act;

c) the effective management of the employee’s work area;

d) the integrity and good reputation of the ACTPS and the Directorate; and

e) the relevance of the offence to the employee’s duties.

Where criminal charges are laid against an employee and the interests of the Directorate or of the ACTPS may be adversely affected, the Head of Service (delegate) may suspend the employee in accordance with H8 (Suspension, Reassignment or Transfer) of most ACTPS Enterprise Agreements.

If an employee is convicted of a criminal offence they are required to provide a written statement advising the Head of Service within seven calendar days of the conviction. Where the conviction has adversely affected the interests of the Directorate or the ACTPS, the Head of Service (delegate) may impose a sanction for misconduct in accordance with H10 (Disciplinary Action and Sanctions) of most ACTPS Enterprise Agreements.

Where an employee fails to advise the Head of Service of a criminal charge, conviction or finding as required by ACTPS Enterprise Agreements, this may be considered misconduct and result in an investigation, disciplinary action and/or sanction.
**RIGHT OF APPEAL**

ACTPS Enterprise Agreements provide employees with mechanisms to request a review of a decision that affects them. The employee may appeal:

- decisions to suspend the employee without pay in relation to an investigation; and
- decisions to take disciplinary action in response to an investigation, except a decision to terminate the employee’s employment.

Employees may initiate an appeal by making an application to the Convenor of Appeal Panels.

The Head of Service has nominated the Client Manager, Employee Relations & Training, Shared Services, CMTEED, as Convenor of Appeal Panels for the ACTPS.

Applications must be in writing and describe the action taken or to be taken, the reasons for the application and the outcomes sought. Generally, an application must be received by the Convenor of Appeal Panels within 14 calendar days of the employee being notified of the decision to take the action. Where the application meets these requirements, the Convenor of Appeal Panels will establish an appeal panel to consider the application.

Applications should be sent to:

The Convenor of Appeal Panels  
Shared Services Employee Relations  
**SSHREmployeeRelations@act.gov.au**  
Level 4, Eclipse House, 197 London Circuit  
Canberra City, 2601

An employee may also have an entitlement to bring an action under the Fair Work Act (2009) in respect of a decision to terminate the employee’s employment as a result of underperformance or discipline action. This is the sole right of review for a decision to terminate employment.

An employee does not have any right of review under Section I (Internal Review Procedures) of most ACTPS Agreements in relation to any action, decision or process arising from an investigation and subsequent disciplinary action and sanctions.
APPENDICES
APPENDIX I: RELEVANT PRINCIPLES TO ADHERE TO WHEN MANAGING WORKPLACE BEHAVIOUR

Many of the principles discussed within this section are generally applicable during the Preliminary Assessment, Investigation and Post-Investigation processes. Specifically, during investigations and when taking disciplinary action in relation to repeated acts of underperformance (i.e. when the situation moves from non-disciplinary to disciplinary action), the following principles must all be applied.

PROCEDURAL FAIRNESS

When conducting an investigation one of the primary aims is to ensure that all procedures are followed correctly. This helps prevent an employee being treated unfairly or unreasonably and having to seek an avenue of redress, such as an internal review, appeal or unfair dismissal claim.

In the context of alleged misconduct and action taken in relation to cases of repeated underperformance, procedural fairness requires that:

a) the employee be made aware of the allegations and the process to be followed in investigating those allegations;

b) the investigator provide the employee with an opportunity to comment on all evidence that is credible, relevant and significant;

c) that the investigator conduct the fact finding process with an open mind, free from bias or other interest in the outcome of the process;

d) that the delegate be similarly unbiased and free from any interest in the outcome of the process; and

e) that the delegate offer the employee an opportunity to comment on the proposed findings as to misconduct and any proposed sanction before making a final decision.

Determinations regarding employee misconduct may be overturned if, upon review, it becomes evident that there were flaws in the investigative process. This may include if the investigator: fails to comply with proper procedures; acts for the wrong purpose; exercises power in bad faith; fails to take into account relevant information; or takes into account irrelevant information or acts unreasonably. Having to conduct another investigation because the first investigation was flawed is traumatic and stressful for the parties involved, and costly in terms of time, resources and money. It is therefore important that procedural fairness is afforded and the investigation conducted properly.

CONFIDENTIALITY

All information about an alleged misconduct must be kept confidential before, during and after the investigation process. This helps ensure fair treatment and process, minimises the risk of victimisation, helps avoid defamation proceedings and to respect people's privacy. It will also help develop and maintain employee confidence in the process. When non-disciplinary techniques are applied, the confidentiality principles will also apply.

Many allegations of misconduct arise as a result of a complaint made by one employee against another. In some situations a complainant may wish to remain anonymous, or the complaint may be received anonymously.

In some cases public interest disclosure legislation may protect an individual’s identity or it may be possible to conduct the investigation without revealing the identity of the informant. Regardless, a complainant should always be advised that their identity may be revealed, either in the course of the investigation or through the legal proceedings that may follow.

Note also that a public employee who receives an allegation of misconduct must report it, even if the complainant does not wish them to. This is especially the case where the complaint presents a potential health and safety risk.
A complainant will often want to know the outcome of the investigation. In order to protect the respondent’s right to privacy, the organisation should only inform the complainant that an investigation took place. To provide the complainant with additional information such as the outcomes of an investigation, or the delegate’s considerations, may be a breach of privacy. If in doubt, it may be appropriate to seek legal advice before deciding what information, if any, can lawfully be disclosed to a complainant or a third party in relation to a misconduct process.

In some cases, an employee subject to an allegation or complaint may request a copy of the investigation report. If the delegate determines that misconduct has been found to have occurred in relation to one or more of the allegations made against an employee, the delegate should generally provide that employee with a copy of the investigation report. This will ensure that the employee is fully apprised of all of the evidence relevant to the allegations before responding to any proposed disciplinary action.

In some circumstances it may be necessary to provide the employee with a redacted version of the report (or a summary) in order to protect the privacy of certain individuals who were involved in the investigation, without providing them with a copy of the whole document. However this will only be considered to be procedurally fair if the employee is provided with details of the report that are sufficient to enable the employee to fully understand the case against them.

If you are considering not providing the employee with a complete copy of the investigation report in any particular case you should first seek the advice of your HR area.

In certain circumstances a person may be able to access information held about them through freedom of information legislation or litigation (e.g. via subpoena). All parties (including witnesses and complainants) should be advised of this prior to providing information to an investigator.
APPENDIX 2:
TIPS FOR MANAGERS WHEN DISCUSSING ALLEGATIONS WITH EMPLOYEES

1. Advise the employee of the issues to be addressed/allegations.
   • Ensure adequate notice is provided (e.g. 24 hours).
   • Invite the employee to have a support person or union representative present.
2. Organise for a note taker/support person for yourself as the manager.
3. Consider where you will meet.
   • It may be preferable to meet away from the immediate workplace for privacy.
4. Set an agenda outlining the matters to be discussed.
   • Be clear on the behaviours/issues to be addressed and how they fall short of expectations/required standards (consider using a script).
   • Familiarise yourself with the procedures.
5. Focus on the behaviours.
   • Provide specific examples.
   • Have copies of relevant policies and procedures available to refer to and to provide to the employee.
   • Explain the consequences if the behaviour continues.
6. Approach the problem constructively in a problem solving manner.
   • Allow the employee to respond and provide an explanation.
   • Ask the employee for their input and suggestions on resolving the problem.
   • Consider the response before agreeing/determining a way forward.
   • If possible, arrive at an agreement, with the employee accepting responsibility for making the necessary improvement.
   • Be assertive, but do not respond to aggressive behaviour.
   • Summarise the outcome of the meeting making sure the employee clearly understands what is being discussed, and that they have mutually agreed on a plan of action (if relevant or possible).
7. Document the meeting (an email summary may suffice).
   • Provide a copy of the record of the meeting to the employee.
   • Set a date for a review.
8. Follow through on agreed actions.
APPENDIX 3: RECORD KEEPING

WHY IS RECORD KEEPING IMPORTANT?
All correspondence with an employee, who is the subject of misconduct allegation or unsatisfactory performance issue in the workplace, should be documented. It is extremely important to keep all correspondence, and document all conversations and action taken to avoid any dispute between the parties, in the case of a disagreement between versions of events arises.

WHAT RECORDS SHOULD BE KEPT?
Material placed on a file should include:

- Relevant correspondence including letters, emails, and attachments and the employee’s response/s to correspondence;
- notes of telephone calls and conversations in general (including time and date of calls and conversations, and the essential details of these). Notes of telephone calls and conversations should ideally be sent to an employee for confirmation. This can generally be done by email;
- the investigation report with all relevant evidence, including transcript of evidence and/or submissions made by the parties;
- draft material (if it contains information relevant to the decision); and
- file notes of action taken in the process.

WHERE SHOULD THESE RECORDS BE KEPT?
At the conclusion of an investigation, related materials and records should not be placed on an employee’s personnel file. Instead, they should be placed in a separate misconduct or investigation file. This is because the investigation report and investigation material may contain sensitive information about the employee and other persons involved in the investigation. The personnel file and investigation file, however, should be linked for reference purposes and restricted to only those who need access for a proper reason.

However, if a sanction is imposed on an employee as a result of an investigation, details of this should be placed on an employee’s personnel file as it forms part of their employment history.
APPENDIX 4: USEFUL LINKS

Fair Work Act 2009

Public Sector Management Act 1994

Public Sector Management Standards 2006

ACTPS Enterprise Agreements

ACTPS Respect, Equity and Diversity Framework

Standards for the conduct of inquiries and investigations for ACT Agencies

ACTPS Code of Conduct

ACTPS Code of Ethics

ACTPS Integrity Policy

ACTPS Values and Signature Behaviours
incmtd/BP Documents/ACTPS Values and Signature Behaviours.pdf

ACT Public Service Work Safety and Injury Management Policies

Work Health and Safety Act 2011

WHS (Preventing and Responding to Bullying) Code of Practice 2012

ACT Public Service Performance Framework

ACT Human Rights Commission

Freedom of Information Act 1989

Public Interest Disclosure Act 2012
Privacy Act 1988 and Information Privacy Principles (Cwlth)

Workplace Privacy Act 2011

Territory Records Act 2002

Protective Security Policy Guidelines
sharedservices/actgovt/ACTPSdocs/Protective-Security-Policy-Framework.pdf

AGTPS Employee Relations Team documents/fact sheets
sharedservices/SSCstaff/Documents/Documents-List.asp?qFind=ER-Training

Information and Communication Technology (ICT) Policies, Standards and Guidelines
sharedservices/actgovt/ICTpolicies.htm

Social Media Policy 2012
sharedservices/actgovt/ACTPSdocs/Social-Media-Policy-Guidelines.pdf

Guidelines for Independent Reviewers and Appeal Panels

Shared Services Workplace Investigation or Review Request Form
sharedservices/actgovt/HRforms/WorkplaceInvestigationReviewRequest.doc
APPENDIX 5: EVIDENCE – A QUICK GUIDE FOR INVESTIGATORS

The task of an investigator is to substantiate or refute any matter(s) of fact raised by an allegation. The means available to an investigator to accomplish this is known as evidence. The main categories of evidence are: oral evidence; documentary and physical evidence; expert evidence; and site inspections.

Although only one witness may be required to substantiate a fact or set of facts, additional evidence in the form of corroboration (i.e. the strengthening of evidence) is desirable.

If the allegations ultimately become the subject of legal proceedings, the evidence collected during the investigation may take on the character of forensic evidence. Forensic evidence refers to evidence used in, or connected with, a court of law.

There is always a possibility that the complaints/allegations will result in the institution of legal proceedings either during, or at the conclusion of, the investigation. Proper preparation of an investigation plan will help to ensure that evidence is gathered appropriately and can be safely relied upon in any legal proceeding should the need arise.

UNDERSTANDING THE RULES OF EVIDENCE

The rules of evidence apply to investigations in the sense that understanding the basic rules of evidence is useful for an investigator to ensure that the evidence obtained is the best available and will be admissible should there be subsequent legal proceedings. These rules include:

I. RELEVANCE:

The most fundamental rule of the evidence is that the evidence must be relevant to a contended fact. For example, if the question is whether Dan stole money from petty cash, it is not relevant to ask questions about Dan’s work performance or his interactions with colleagues. The inclusion of prejudicial and irrelevant information in a final report has the potential to create a perception of bias on the part of the investigator and on the part of a delegate who reads the report.

2. HEARSAY

In broad terms, hearsay evidence is evidence based on what has been reported to a witness rather than what the witness has directly heard, seen or experienced. The rule only applies where that evidence is used to prove the truth of what was asserted in the report. For example, if Bill tells the investigator that “Mary said she saw Dan take the money from the petty cash box”, that would be hearsay evidence as to whether Dan stole the petty cash, but it would not be hearsay as to whether Mary and Bill had a discussion about Dan.

Complex rules and exceptions apply to hearsay evidence in Court hearings. However, for the purposes of most investigations it is sufficient to understand that hearsay evidence carries less weight than direct evidence and that it is always better to try to get the information directly from the source (e.g. in the above scenario, talk to Mary about what she saw, rather than relying on Bill’s report of it).

3. OPINION

The ‘opinion evidence rule’ requires that witnesses confine their evidence to what they actually perceived with their senses (i.e. saw, heard, felt, tasted or smelt) rather than what they think, believe or infer on the basis of those perceptions. Exceptions to the rule include where the witness is offering expert evidence based on their particular field of expertise or experience, or where an expression of opinion is necessary to explain the witness’s perceptions.

For example, if Mary says that “Dan was acting suspiciously”, that is opinion evidence about Dan’s demeanour and is of no weight. Instead, the investigator should ensure that Mary states exactly what she witnessed (e.g. “Dan was standing in front of the petty cash box. I could not see what he was doing, but I saw him look over his shoulder and around the room. He then put his hands in his pockets, stepped back and walked quickly to his desk”). Note that in this scenario, the use of the word “quickly” is an opinion, but it is arguably necessary to explain Mary’s perception of what she saw.
4. SIMILAR FACT EVIDENCE:

Broadly, the rules of evidence provide that evidence about a person’s behaviour on other occasions may only be used as evidence of their conduct on the occasion in issue where that evidence is of significance probative value and (in criminal matters) that outweighs any prejudice to the person. This rule would apply most particularly to evidence that a person has a tendency to engage in inappropriate behaviour or that they have committed misconduct before.

Investigators should generally try to avoid using ‘similar fact evidence’ to determine whether allegations are substantiated, as use of such evidence may give rise to perceptions of bias or unfairness. Where such evidence is used for this purpose it must be relevant and highly probative and the employee must be given an opportunity to address both the evidence itself and the inferences that the investigator wishes to draw from it.

If the allegations are substantiated, similar fact evidence may be relevant to sanction.

The most important rule in all cases where oral evidence is being taken is accuracy. The three principal ways in which oral evidence can be recorded are by tape recording, by preparing a record of interview or by creating a witness statement. The manner in which oral evidence is recorded will largely depend on the purpose for which the record is taken. The more likely it is that the record will be used as evidence, the more important it is that a full transcript or fully signed witness statement be prepared.

OBTAINING ORAL EVIDENCE

Oral evidence is the most difficult form of evidence to obtain since the processes and channels for its transmission and reception are subject to the vagaries of the human condition. Witness recall is imperfect, every witness responds differently to the interview process and every witness’s unique psychology is brought to bear in the interview situation. These complexities are compounded in the case of special classes of vulnerable witnesses, such as children.

The quality of the oral evidence obtained depends to a large extent on the interviewing skills of an investigator. Apart from a thorough knowledge of the Directorate and its policies, practices and procedures, the keys to successful interviewing are good analytical and communication skills, a high degree of good sense and judgment, professionalism and integrity.
APPENDIX 6:
THE ROLE OF A SUPPORT PERSON

As mentioned throughout the Guide, an employee is entitled to have a support person present during interviews and/or meetings related to the underperformance or disciplinary processes set out in Section H (Workplace Values and Behaviours) of most ACTPS Agreements.

A support person may be a third party including an employee’s friend or family member, or union representative. Investigators must ensure that any third party present during interviews:
• is not a potential witness;
• has not agreed to assist any other witnesses to the investigation; and
• has undertaken to respect the confidential nature of the interview.

The role of the support person can include:
• providing emotional support and reassurance to the employee;
• taking notes during the interview;
• asking clarifying questions or explaining questions and processes to the employee; and
• requesting breaks during the interview.

While a support person can, where appropriate, advocate on behalf of an employee (object to certain questions, provide support, clarify matters), all parties must remember their obligation to participate in the investigative process in good faith, as set out under Section H (Workplace Values and Behaviours) of most ACTPS Enterprise Agreements. It must also be remembered that the primary purpose of the interview is an opportunity for the employee to respond to questions of fact (if they so choose) and so it is for the employee (and not the support person) to provide that response.

All parties involved in the investigative interview process should:
• remain respectful;
• ensure appropriate behaviour;
• attempt to avoid conflict;
• remain focussed on the purpose of the interview as being an opportunity for the interviewee to respond to questions of fact; and
• maintain an appropriate regard for the role of management/the investigator in the interview process.
APPENDIX 7: ACTPS WORKPLACE BEHAVIOUR MANAGEMENT FLOW CHART