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GUIDELINE OF THE COMMISSIONER FOR PUBLIC SECTOR EMPLOYMENT:

MANAGEMENT OF UNSATISFACTORY PERFORMANCE

INTRODUCTION

This Guideline is intended to assist managers in agencies which employ persons under Part 7 of the Public Sector Act 2009 (“the Act”) to manage the unsatisfactory performance of public servants - including alleged incidences of misconduct. The general content of the Guideline will also be of guidance to managers throughout the remainder of the public sector.

The Commissioner for Public Sector Employment is empowered to issue guidelines relating to public sector employment matters pursuant to section 14(d) of the Act.

The Guideline is written with the following Objects of the Act in mind:

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

The following public sector principles from the Act have also informed the content of the Guideline:

5—Public sector principles

... 

(6) Ethical behaviour and professional integrity

Public sector employees are to—

- be honest;
- promptly report and deal with improper conduct;
- avoid conflicts of interest, nepotism and patronage;
- treat the public and public sector employees with respect and courtesy;
- make decisions and provide advice fairly and without bias, caprice, favouritism or self interest;
- deal with agency information in accordance with law and agency requirements;
- avoid conduct that will reflect adversely on the public sector;
- accept responsibility for decisions and actions; and
- submit to appropriate scrutiny.
The Guideline is not a substitute for specialist human resource management, industrial/employee relations or legal advice.

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

**PUBLIC SECTOR AND PUBLIC SERVICE**

An initial step in managing the conduct of any employee is to recognise the nature of their employment. For the purposes of this Guideline, the important question is; “is the employee a Public Servant or otherwise employed pursuant to Part 7 of the Public Sector Act 2009?”

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

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

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

‘Public sector employee’ is defined as:

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

‘Public sector’ agency is defined as:

**public sector agency** means—

(a) a Minister; or
(b) a chief executive of an administrative unit; or
(c) an administrative unit; or
(d) an employing authority; or
(e) any other agency or instrumentality of the Crown; or
(f) a body corporate—
   (i) comprised of persons, or with a governing body comprised of persons, a majority of whom are appointed by the Governor, a Minister or an agency or instrumentality of the Crown; or
   (ii) subject to control or direction by a Minister; or
(g) a person or body declared under subsection (3) to be a public sector agency; or
(h) a subsidiary of a Minister or a person or body referred to in a preceding paragraph,

but does not include—

(i) a person or body declared under an Act not to be part of the Crown or not to be an agency or instrumentality of the Crown; or
(j) a person or body declared under subsection (3) not to be a public sector agency;
The ‘Public Service’ is defined in Part 6 of the Act as follows:

**Part 6—Public Service**

**24—Public Service administrative units**

The Public Service consists of administrative units which may take the form of—

(a) a department; or

(b) an attached office.

**25—Public Service employees**

(1) Subject to subsection (2), all persons employed by or on behalf of the Crown must be employed in the Public Service under this Act.

(2) The following persons are excluded from the Public Service:

(a) members of the judiciary;

(b) police officers;

(c) protective security officers appointed under the Protective Security Act 2007;

(d) the Auditor-General;

(e) the Ombudsman;

(f) the Police Complaints Authority;

(g) the Electoral Commissioner and the Deputy Electoral Commissioner;

(h) an officer of either House of Parliament or a person under the separate control of the President of the Legislative Council or the Speaker of the House of Assembly or a member of the joint parliamentary service;

(i) the Commissioner;

(j) members of the Public Sector Grievance Review Commission;

(k) an employee appointed by the employing authority under the Education Act 1972;

(l) an officer or employee appointed by the employing authority under the Technical and Further Education Act 1975;

(m) a person appointed by the Premier or the Minister under Part 8;

(n) a person who is remunerated solely by fees, allowances or commission;

(o) an employee who is remunerated at hourly, daily, weekly or piece-work rates of payment (other than a person expressly engaged by writing as a casual employee in the Public Service);

(p) a person who is excluded under any other Act from the Public Service;

(q) a person whose terms and conditions of appointment or employment are under another Act to be determined by the Governor, a Minister or any specified person or body;

(r) a person excluded from the Public Service by proclamation under subsection (3).
(3) The Governor may, by proclamation—
   (a) exclude a person or class of persons from the Public Service; or
   (b) vary or revoke a proclamation under this subsection.

A Public Servant is a person employed under the Act in an administrative unit or attached office, who is not excluded from the Public Service under section 25(2) of the Act. Public Service employees are employed pursuant to Part 7 of the Act. Part 7 of the Act also applies to employment in agencies outside the Public Service to the extent provided by another Act or the regulations under the Act. Currently, the only other employment the Act applies to outside of the Public Service is employment in the Courts Administration Authority pursuant to the Courts Administration Act 1993 and employment in TAFE SA in classifications under the South Australian Public Sector Wages Parity Enterprise Agreement: Salaried 2012 (or successor). That Part also applies to certain employees in non-Public Service agencies due to the terms of transfer instruments.

NATURAL JUSTICE AND PROCEDURAL FAIRNESS

The opportunity to be heard by an impartial decision maker is at the heart of the rules of natural justice and procedural fairness. The rules of natural justice apply whenever the rights, property or legitimate expectations of an individual are affected by a decision. Decisions in the context of the management of alleged unsatisfactory performance are administrative decisions that may clearly affect the rights or legitimate expectations of employees and the rules of natural justice and procedural fairness must therefore be applied.

Satisfying the rules of natural justice and procedural fairness will vary according to the specific circumstances. There are, however, important basic principles that apply to every situation.

There are three basic principles employers must follow/adhere to: these are commonly known as the hearing rule; the bias rule and the no evidence rule.

The hearing rule

The hearing rule demands that a decision-maker must give an opportunity to a person whose interests may be adversely affected by their decision the opportunity to be heard. This means the employee who is the subject of a disciplinary process, must be provided with as much detail as possible about the allegations against him/her and the factual basis for those allegations and be afforded the opportunity to respond. This can be achieved orally (in an interview format) or – more usually – by correspondence, or a combination of such processes. The nature and seriousness of the allegations will inform the processes required. Where documentary evidence supports allegations

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1 See section 41 of the Act.
2 When such employees were transferred from employment in a Public Service agency to employment in a non-Public Service agency. For example, certain employees in the Urban Renewal Authority.
3 This right is expressed as the audi alteram partem rule. See “Hear the other side”, Flick G (1984) Natural Justice - Principles and Practical Application - second edition, Butterworths, Sydney, p 26. The other limb of natural justice is expressed as nemo debet esse judex in propria causa - “No one ought to be a judge in his/her own cause”.

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political beliefs would not only be irrelevant considerations but if considered would amount to discrimination under relevant legislation.

As indicated, an administrative decision-maker/authority may not exercise their power unreasonably. Courts may interfere with an administrative decision if it was so unreasonable that no reasonable decision maker could have come to it in the circumstances. Proving unreasonableness is a difficult burden.

Natural justice and procedural fairness are common law concepts; as such they can be varied by legislation. Indeed the Act has varied the common law with respect to the termination of Public Servants’ employment (see later discussion on this issue).

As stated, what satisfies the rules of natural justice and procedural fairness will depend on the facts and circumstances of each individual case. It is unwise for agencies to impose obligations on themselves by policy additional to that demanded by the Act, the Public Sector Regulations 2010 (“the Regulations”) and/or the common law.

For additional guidance on procedural matters, see section on Practical Management of Alleged Unsatisfactory Performance in the Nature of Misconduct, practical tips and the Schedules to this Guideline.

UNSATISFACTORY PERFORMANCE - INCLUDING MISCONDUCT

Public sector employees must satisfy far higher ethical standards than employees in the private sector. All public sector employees are bound by the Code of Ethics for the South Australian Public Sector (“the Code of Ethics”) at all times. The Code of Ethics is discussed later. Public sector agencies and employees must also conduct themselves in a manner that is consistent with the public sector principles set out in section 5 of the Act:

- public focus;
- responsiveness;
- collaboration;
- excellence; and
- ethical behaviour and professional integrity.

Many public sector employees are subject to additional ethical obligations in the form of professional/occupational codes of ethics/conduct. The content of these codes are relevant in deciding whether an employee’s conduct is in breach of the Code of Ethics.

Generally speaking, the more senior an employee, the higher the expectations upon them in terms of their ethical and professional conduct.

Consideration of whether an employee is performing their duties satisfactorily or not is a broad one. It is not simply a question of whether the employee is performing their technical duties adequately, but an objective assessment of their entire conduct as a public sector employee. To use simple but common examples, if an employee is constantly late for work or discourteous to others, their performance is unsatisfactory regardless of how well they are performing their official duties. Similarly, repeated or constant absence/s from the workplace is unsatisfactory performance. Indeed, it is not necessary for an employee to intentionally

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8 For a good discussion of these principles, refer, for example, to Hall v State of South Australia [2010] SASC 219 at pages 11 and 12.
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perform unsatisfactorily and it is often the case the cause of unsatisfactory performance is out of the employee’s control (i.e. illness or disability).

Sometimes it will be obvious that an employee’s alleged conduct should be managed as misconduct. In other words, if proven, the conduct will amount to misconduct. Clear examples are theft or assault. Other conduct that can amount to misconduct, can also be dealt with as unsatisfactory performance per se. Examples include repeated attendance issues (i.e. lateness for work or a pattern of absences) or less serious incidents of contravention or failure to comply with managerial directions. The important consideration from a managerial perspective is to identify when conduct is unsatisfactory and acknowledge there is an obligation upon management to manage it appropriately.

Unsatisfactory performance per se
Keeping in mind the broad definition of unsatisfactory performance, where an employee is performing their duties unsatisfactorily and it does not appear that the unsatisfactory performance may be caused by a mental or physical incapacity; then before imposing a sanction on an employee in light of such unsatisfactory performance or acting otherwise in a manner that affects the employee’s rights, interests or legitimate expectations, management needs to be able to demonstrate objectively that:

- the employee’s performance has been unsatisfactory;
- management have made the employee aware of the manner in which their performance is unsatisfactory; and
- the employee has been provided with a reasonable opportunity to remedy their unsatisfactory performance with assistance from management (i.e. training or infrastructure) as reasonably required.

Whilst a formal performance management program/process is not inherently required to demonstrate or manage unsatisfactory performance, it will provide evidence in a coherent manner that can be relied upon if required. Note that agencies are required to have performance development and management processes in place pursuant to section 8 of the Act.

The sanctions available for unsatisfactory performance by an employee employed under Part 7 of the Act are a reduction in remuneration pursuant to section 53 of the Act or termination of their employment pursuant to section 54. Transfer or assignment of an employee to alternative duties may also be an appropriate managerial response to unsatisfactory performance of an employee.

Where, following a performance management process, management is at the point where it proposes to impose a sanction on an employee in light of their unsatisfactory performance, the employee must be afforded procedural fairness - i.e. advised of the conclusion that their employment is unsatisfactory and the manner in which it is (and has been) unsatisfactory and the proposed sanction management proposes to impose in light of that conclusion; and provide the employee with a reasonable opportunity to make a written submission as to the findings and proposed course of action. If, after receiving and objectively considering any submission from or on behalf of the employee, the decision-maker is not persuaded to alter their decision - or if the employee makes no submission - he/she may make a final decision to impose a sanction.

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7 i.e.: issuing managerial directions or giving consideration to assigning or transferring them to alternative duties.
8 Similarly, if intending to transfer or assign an employee to alternative duties on account of the unsatisfactory performance of their substantive (current) duties, they must be put on notice as to the intent to do so and afforded
A chief executive/delegate cannot terminate the employment of an employee until they have sought and considered advice from the Commissioner for Public Sector Employment pursuant to section 54(3) of the Act as to the adequacy of the processes leading up to the intended termination.

**Unsatisfactory performance caused by mental or physical incapacity - power to require medical examination**

Section 56 of the Act is entitled ‘Power to require medical examination’ and provides for agencies to direct employees to undergo a medical examination by an independent medical practitioner where they are performing their duties unsatisfactorily and it appears that such unsatisfactory performance may be caused by mental or physical incapacity.

**56—Power to require medical examination**

1. If—
   - an employee of a public sector agency is not performing the employee’s duties satisfactorily; and
   - it appears to the agency that the employee’s unsatisfactory performance may be caused by mental or physical incapacity,

   the agency may require the employee to undergo a medical examination by a medical practitioner selected by the employee from a panel of medical practitioners nominated by the agency.

2. If an employee refuses or fails, without reasonable excuse, to submit to a medical examination as required under subsection (1), the public sector agency may suspend the employee from duty (without remuneration and accrual of leave rights) until the employee submits to a medical examination as required by the agency.

3. The public sector agency must—
   - furnish the employee with a copy of any report on the results of a medical examination required under this section; and
   - before taking any action on the basis of the report, allow the employee a period of not less than 14 days from the date of the employee’s receipt of the report to furnish the agency with any medical reports obtained by the employee on his or her mental or physical condition.

Again, managers should keep in mind the broad interpretation of unsatisfactory performance when determining if an employee’s performance is unsatisfactory. When relying on the power to require a medical examination, management should direct employees to undergo examination by relevant medical specialists, not a General Practitioner. Where an employee has a suspected mental incapacity, it is recommended they be required to attend at a Psychiatrist, not a Psychologist.
For practical purposes, the panel of practitioners provided to the employee to choose from need only contain two choices. Management should confer with injury management personnel in or outside their agency as to the names of suitable medical practitioners. Management should book appointments with both practitioners on a panel and cancel the appointment with the one not chosen by the employee.

Employees are required to submit to a medical examination when directed under section 56. This means they are not only required to attend at appointments but cooperate with the relevant medical practitioner so as a proper examination can be performed. If an employee fails, without reasonable excuse, to submit to a medical examination they may be suspended from duty, with or without remuneration and/or the rights to accrue leave entitlements. Management must afford employees procedural fairness where they propose to suspend them from duty in response to alleged failure to submit to a medical examination.

Where there are grounds for directing an employee to undergo a medical examination on account of unsatisfactory performance, it will often be the case that management may reasonably conclude that the employee poses a risk to the health, safety or welfare of themselves or others. Where this is so and it is not possible to make reasonable modifications to enable the employee to perform the inherent requirements of their role/duties, the employee should be directed to remain absent and only permitted to work when/if they produce medical certification that they are fit and able to perform their duties without restriction. When employees are not fit to perform their duties on this basis, they are not entitled to be remunerated and must access accrued entitlements to paid leave in order to be remunerated.

Management of an employee following receipt of a medical report/s (from an independent medical practitioner and/or a report furnished by the employee from another practitioner) will depend on the diagnosis and prognosis in the report/s:

- if the report/s indicate that the employee is suffering from a mental or physical incapacity and such incapacity is the cause of their unsatisfactory performance, the employment of the employee may be terminated but only after the agency has attempted to identify alternative employment for the employee pursuant to section 54(2) and the chief executive of the agency has taken into account advice from the Commissioner for Public Sector Employment pursuant to section 54(3); or

- if the report/s indicate that the employee is suffering from a mental or physical incapacity and such incapacity is not the cause of their unsatisfactory performance - as well as satisfying themself that the employee is fit for the purpose of work generally - the employee’s unsatisfactory performance should be managed in the standard manner; or

- if the report/s indicate that the employee is not suffering from a mental or physical incapacity, then their unsatisfactory performance should be managed in the standard manner.

See also the Commissioner for Public Sector Employment Guideline: Power to Require Medical Examination – Section 56 of the Public Sector Act 2009.

Disciplinary action

Section 55 of the Act is entitled Disciplinary action and provides for some of the sanctions that may be imposed upon employees for admitted or proven incidents of misconduct:
55—Disciplinary action

(1) A public sector agency may—
   (a) reprimand an employee of the agency; or
   (b) suspend an employee of the agency from duty without remuneration or accrual of leave rights for a specified period,

   on the ground of the employee's misconduct.

   Note—

   Disciplinary action may also take the form of—
   (a) reduction of the remuneration level of an employee under section 53; or
   (b) termination of an employee's employment under section 54.

   A public sector agency may, in conjunction with taking disciplinary action—
   (a) assign an employee to different duties or to a different place under section 47; or
   (b) transfer an employee to other employment under section 9.

   (2) Nothing prevents a public sector agency from taking more than one form of disciplinary action against an employee for misconduct.

   Note that there is no particular form of a reprimand. Correspondence advising an employee that they have been sanctioned by or including by the imposition of a reprimand will act as the reprimand. It will traditionally include a warning of the possibility of more serious consequences in the event of future proven misconduct.

Misconduct as defined in the Act

‘Misconduct’ is defined in the Act as:

misconduct means—

   (a) a breach of a disciplinary provision of the public sector code of conduct while in employment as a public sector employee; or
   (b) other misconduct while in employment as a public sector employee,

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

   Misconduct then, is a breach of the disciplinary provisions of the Code of Ethics (which is the Code of Conduct for the purposes of the Act) or other misconduct, which means behaviour that amounts to misconduct at common law.

   Examples of categories of conduct that can amount to misconduct at common law are failure:

   • to comply with or contravention of the duty of obedience and cooperation. For example, failing to comply with lawful and reasonable managerial directions or conduct that undermines or disrupts the employer’s functions; or
   • to perform work with a reasonable degree of competence or skill and/or to a proper standard; or
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• to observe the duty of fidelity and confidentiality.  

Reduction in remuneration level

Section 53 of the Act is entitled Reduction in remuneration level and represents another possible sanction for misconduct or unsatisfactory performance. An employee’s remuneration may also be reduced pursuant to this section where they are excess to the requirements of an agency at a higher remuneration level or they lack an essential qualification for performing duties at a higher level. Section 53 states:

53—Reduction in remuneration level

(1) A public sector agency may reduce the remuneration level of an employee of the agency without the employee’s consent on any of the following grounds:

(a) the employee is excess to the requirements of the agency at the higher remuneration level;

(b) the employee’s physical or mental incapacity to perform duties satisfactorily at the higher remuneration level;

(c) the employee’s unsatisfactory performance of duties at the higher remuneration level;

(d) the employee’s misconduct;

(e) the employee’s lack of an essential qualification for performing duties at the higher remuneration level.

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

(3) If an employee’s remuneration level is reduced under subsection (1)(a), the employee is entitled to supplementation of the employee’s remuneration in accordance with the relevant provisions of an award or enterprise agreement or, if there is no award or enterprise agreement covering the matter, in accordance with a scheme prescribed by the regulations.

(4) The power to reduce an employee’s remuneration level under this section includes (without limitation) power—

(a) to reduce an employee’s remuneration level to a remuneration level from a classification structure, or different classification structure, fixed by a determination of the Commissioner under Part 4; and

(b) to reduce an employee’s remuneration level to a remuneration level for a class of employees not subject to a determination of the Commissioner under Part 4; and

(c) to reduce an employee’s remuneration level as a preliminary step to assigning or transferring the employee to other duties in the agency or other public sector employment (whether or not employment to which this Part applies).

9 A good discussion of these concepts can be found in Stewart’s Guide to Employment Law, second edition, 2009, Federation Press at pages 214 to 220 and 225 to 239.
As sections 53 and 55 make clear, agencies may impose one or more sanctions for unsatisfactory performance that is in the nature of misconduct or may reduce an employee’s remuneration for unsatisfactory performance per se. Reference in section 53 to ‘higher remuneration level’ means an employee’s substantive remuneration (classification) level.

**General power to suspend employees from duty**

Section 57 is entitled ‘Power to suspend from duty’ and states:

**57—Power to suspend from duty**

(1) A public sector agency may suspend an employee of the agency from duty pending the completion of any investigation, process or proceedings in respect of alleged misconduct by the employee if the agency decides that it is in the public or agency’s interest to do so.

(2) Subject to subsection (3), a suspension will be with remuneration.

(3) A suspension may be without remuneration if—

(a) the employee has been charged with an offence punishable by imprisonment; or

(b) the employee has been given notice setting out details of alleged misconduct on the part of the employee and inviting the employee to show cause why disciplinary action should not be taken against the employee.

(4) A public sector agency must reimburse remuneration withheld as a result of the suspension of an employee from duty if a court finds the person not guilty of the offence or the agency decides that the person was not guilty of misconduct (or both if the employee has been both charged with the offence and given notice setting out details of alleged misconduct).

(5) A public sector agency may revoke a suspension at any time.

In section 57, the intent of Parliament is clear; that where suspension of an employee from duty is warranted, in most circumstances it will be with remuneration.

Aside from when an employee is charged with a criminal offence punishable by imprisonment, section 57(3)(b) of the Act provides that an employee cannot be suspended without remuneration until they have been given notice setting out detail of the allegations against them and have been provided with an opportunity to respond as to why they should not be disciplined. It is clear that the relevant alleged misconduct would need to be serious and that termination would be the inevitable result if the employee is found liable to disciplinary action. Logically, in order for an agency to be in a position to suspend an employee without remuneration in these circumstances (to be able to give them notice), it must be at the point in a process where it is able to put detailed allegations to the employee. This means when an investigation is concluded and all evidence is to hand - not when suspicions or partial evidence exists.

There may be occasions where there is clear evidence of particular serious and wilful misconduct that on its own would justify termination if proved and justify an agency giving an employee notice etc and suspending them without remuneration, even though there may be an on-going investigation into other suspected misconduct. This would be unusual however and in most circumstances, investigations will need to have been completed so as a comprehensive picture is created.

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10 Section 57(3)(a) of the Act.
The relevant considerations decision-makers need to take into account when considering whether to suspend an employee from duty include the seriousness of the allegations; the propensity for the employee to destroy or tamper with evidence; OHS&W considerations; and the possible embarrassment to the chief executive, agency, public sector and/or Minister and Government should it become publicly known that the employee has been permitted to remain at work whilst suspected of the relevant misconduct. Agencies should always consider if it is viable for employees to continue to perform their substantive duties, to perform alternative duties and/or the same duties from another location, including from home, as an alternative to suspension.

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

It is often appropriate for a chief executive or delegate to issue employees with various managerial directions when suspending them from duty. Common directions include ones requiring an employee for a specific period or until further notice:

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

Where a chief executive or delegate is considering suspending an employee from duty they must be afforded procedural fairness. Where suspension with remuneration is considered, this can occur during a face-to-face meeting where the employee is put on notice as to the intention to suspend them from duty and reasons for that intended decision – and given an opportunity to respond. A break should occur and the meeting reconvened where, if the chief executive or delegate has not been dissuaded from doing so, they can inform the employee they are suspended. Notes should be taken of the dialogue in the meeting and it is sensible for a chief executive or delegate to be accompanied by a Human Resources/Employee Relations specialist. It will usually be the case that where there is an intent to suspend an employee from duty without remuneration, they have already been suspended with remuneration. Where the employee is already suspended from duty, notification of an intention to suspend without remuneration should be via correspondence. It will sometimes be necessary to suspend an employee’s remote access to an agency’s electronic data bases during a period of suspension from duty.
Termination

Section 54 of the Act is entitled ‘Termination’ and contains the grounds an employee’s employment under Part 7 of the Act may be terminated. This includes misconduct and unsatisfactory performance. It also includes when an employee is excess to the requirements of an agency\textsuperscript{11} or where an employee lacks an essential qualification for performing their duties. Section 54 states:

\textbf{54—Termination}

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

(a) the employee is excess to the requirements of the agency;

(b) the employee’s physical or mental incapacity to perform his or her duties satisfactorily;

(c) the employee’s unsatisfactory performance of his or her duties;

(d) the employee’s misconduct;

(e) the employee’s lack of an essential qualification for performing his or her duties.

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

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

(a) has informed the Commissioner of the grounds on which it is proposed to terminate the employment of the employee and the processes leading up to the proposal to terminate; and

(b) has considered any advice given by the Commissioner within 14 days about the adequacy of the processes.

Counselling (managerial caution) [non-punitive managerial response]

Sometimes a decision-maker will find allegations of misconduct against an employee proven but decide that it is not appropriate in the circumstances to impose a disciplinary sanction(s) upon the employee. In such circumstances, the decision-maker can – and often should – caution or counsel the employee. This is often referred to as a managerial caution. It is not a sanction or akin to a sanction and might be accompanied, for example, by a managerial direction to an employee to participate in or undergo a particular form of training or education. Different requirements apply to the retention of records of this sort of managerial response (see storage and otherwise dealing with records).

\textsuperscript{11} Note though that this provision may not be utilised where Government policy of no forced redundancies is in effect.
PRACTICAL MANAGEMENT OF ALLEGED UNSATISFACTORY PERFORMANCE IN THE NATURE OF MISCONDUCT

There is no ‘one size fits all’ way of managing misconduct. Each situation must be managed according to its individual circumstances.

Timeliness

It is imperative that managers address suspected misconduct on the part of employees in a timely manner. A failure to do so is not only negligent on the part of management but can lead to arguments by employees that their (improper) conduct has been condoned.13

Investigation of suspected misconduct

Often, investigation of suspected misconduct is necessary. No power to investigate is required; the function is inherent to the employer-employee relationship and managerial prerogative. The Commissioner for Public Sector Employment has coercive investigative powers under section 18 of the PS Act. When appropriate, the Commissioner can delegate these powers to another person on a case-by-case basis. The use of coercive powers would be required only in exceptional circumstances.

Depending on the nature of the conduct under investigation, investigations can be conducted by local management or, where specialist investigation skills are required, an agency’s specialist investigation unit, a Government Investigator employed in the Crown Solicitor’s Office, or a private investigator – either from a panel of providers accessed through the Crown Solicitor’s Office or through direct contact by an agency.

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

There is no barrier to agencies continuing to investigate and/or otherwise deal with incidents of alleged/proven misconduct if an employee is charged with a criminal offence. This includes finalising disciplinary processes whilst criminal investigations/proceedings are unresolved. Human Resource and/or legal advice should be sought in such circumstances however. Clearly, whether it is appropriate, practical or even possible to conduct a disciplinary investigation and/or process pending a criminal process will depend on the facts and circumstances of the matter and in particular, the alleged conduct of the employee. Some conduct will not be conducive to a separate disciplinary investigation and the chief executive or delegate will need to await the outcome of the criminal process.

Procedural fairness (natural justice) in practice

Before making a decision that an employee has committed misconduct and is therefore liable to disciplinary action; and after having made such decision - prior to imposing a

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12 See also ‘Practical tips’ and Schedules 1 and 2 to this Guideline.
13 From an industrial, not moral perspective.
14 As the relevant authority. See Code of Ethics.
disciplinary sanction/s; management must afford employees procedural fairness. Essentially, this requirement is satisfied by:

- providing employees with detail as to their alleged conduct or the intent to impose (as appropriate); and
- allowing them a reasonable opportunity to respond to allegations and/or the intention to impose a disciplinary sanction/s.

Decision-makers must ensure that they are not biased or that a reasonable person would not form the view they are biased. They should not participate in investigations but may take into account legal advice or that from Human Resources (or some other specialised function where appropriate).

Decision-makers must take into account relevant considerations and not take into account irrelevant considerations.

Relevant considerations in the context of alleged misconduct and/or the imposition of a disciplinary sanction/s upon an employee in light of misconduct include; the seriousness of the relevant conduct; whether the employee admitted the conduct at the earliest available opportunity; length of service and the employee’s past employment record.

Irrelevant considerations include gender, marital status, sexuality, union membership or political or religious beliefs. Not only would such factors be irrelevant but taking them into account would amount to unlawful discrimination.

As stated, satisfying the rules of procedural fairness will vary according to individual circumstances. Usually – but not always – an employee will be interviewed as part of the investigation/information gathering process where allegations are put to them and they are afforded the opportunity to respond. Employees cannot be directed to answer questions but may be directed to attend at a certain place at a given time for the purposes of an interview. Employees must be permitted to be accompanied by a support person, but have no right to have a representative act for them at that juncture. However, management must not be heavy handed in these circumstances and must allow an employee to confer with their support person or representative. Although an interview of an employee suspected of unsatisfactory performance/misconduct is for the purposes of allowing them the opportunity to respond to the allegations under investigation, there will usually be no prejudice in allowing (or management or other reason stopping) an employee’s representative to make statements at an interview.

Where possible, a disciplinary process should occur via correspondence. The decision-maker puts allegations to the employee in writing and affords them the opportunity to respond to the allegations. An employee is to be afforded a reasonable opportunity to respond in writing and any response/submission received must be objectively considered by the decision-maker before a formal decision by them is made and communicated to the employee.

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

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15 Except by the Commissioner or a delegate using the coercive powers under section 18 of the Act.
If a decision-maker finds allegations of misconduct proven and is minded to impose a disciplinary sanction(s), they should notify the employee (again where possible in writing) of the sanction(s) they view as appropriate and provide them with a reasonable opportunity to make a submission in respect of that issue. The decision-maker must objectively consider any submission made by or on behalf of an employee before deciding upon and implementing a sanction(s).

**Advice from the Commissioner for Public Sector Employment - termination**

Under section 54(3), where an agency is proposing to terminate the employment of an employee employed under Part 7 of the Act - for any reason listed in section 54(1), it must inform the Commissioner for Public Sector Employment of the grounds on which it is proposed to terminate the employee’s employment and the processes leading up to the proposed termination. The agency must then consider any advice given by the Commissioner within 14 days, about the adequacy of the processes.

Agencies are not bound to follow the advice of the Commissioner but it would not be prudent for them not to do so where the Commissioner advises that the processes followed are inadequate. Advice provided by the Commissioner will be discoverable and may be later produced in the Industrial Relations Commission of South Australia or a Court. Such advice might, for example, be relevant to the Industrial Relations Commission in deciding whether termination of an employee’s employment was harsh, unjust or unreasonable.

Agencies and/or the Commissioner may seek legal advice from the Crown Solicitor’s Office vis-à-vis a proposal to terminate a person’s employment. This advice will be subject to legal professional privilege and is not to be divulged. This extends to not quoting from or paraphrasing the advice.

**Assignment of different duties or transfer of employees in conjunction with discipline - or other forms of unsatisfactory performance**

Following or during a disciplinary process or the management of unsatisfactory performance *per se*, management will often form the view that it is untenable for an employee to remain in their current duties or work location. Accordingly, a chief executive or delegate may propose that an employee either be transferred to alternative public sector employment under section 9 of the Act or assigned different duties and/or a different location to perform their duties under section 47 of the Act. An employee must be afforded natural justice and procedural fairness in these circumstances. That is, they must be put on notice as to the intent to transfer or assign them and the reasons therefore and provided with a reasonable opportunity to respond as to why this should not occur. A chief executive or delegate must objectively consider any submission from an employee prior to formally deciding to transfer or assign them to alternative duties.

For additional guidance on procedural matters, see the Schedules to this Guideline.

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16 Namely; if they are excess to requirements; for unsatisfactory performance due to mental or physical incapacity; for unsatisfactory performance *per se*; for misconduct; or due to the lack of an essential qualification for performing their duties.
REVIEW OF EMPLOYMENT DECISIONS

Termination of employment

Persons whose employment under Part 7 of the Act has been terminated and who believe that the termination was harsh, unjust or unreasonable, may apply for relief to the Industrial Relations Commission of South Australia (“IRCSA”) pursuant to section 106 of the Fair Work Act (SA) 1994 (“the FW Act”).

The legal principles that would be applied should an employee’s employment be terminated and they challenge it in the Unfair Dismissal Jurisdiction of the IRCSA are neatly summed up in the following extracts from the decision in Department of Administrative and Information Services v Virgin:17

52 On many occasions the Commission or the Court has stated that it is the duty of a tribunal at first instance to determine whether there was a fair and reasonable explanation for the decision to dismiss which, viewed objectively, would be regarded as a totally legitimate reason for the action taken, and that it is not for the tribunal member to simply substitute his or her own opinion for that of the employer. However, it is necessary to understand and apply such statements whilst keeping in mind the fundamental statutory directive of s 108(1) of the current Act, namely that the Commission “must determine” whether “the dismissal is harsh, unjust or unreasonable”.

53 An objective assessment as to whether an employer’s decision to dismiss was within a reasonable range of responses open to it must have regard to all relevant circumstances, and must ultimately be based upon a conclusion as to whether the dismissal can be characterised as harsh, unjust or unreasonable. Before referring to the duty of the Court (as it then was) to ask itself whether there was a fair and reasonable explanation for the dismissal, Olsson J in Hallett Brick Industries Limited v Kenniwell reminded himself that what had emerged from an analysis of previous decisions relating to the then relevant section was that:-

"...there are two vital and successive steps involved in the ultimate decision to be come to.

The first is an assessment as to whether, on the facts as found, the termination of employment can be fairly characterised as harsh, unjust or unreasonable - each of these elements being disjunctive."

54 The reasons of Olsson J which then followed, referring to the duty of the Court to ask itself whether there was a fair and reasonable explanation for the dismissal which would be considered to be a totally legitimate reason for the action taken, and to the injunction that the Court should not place itself in the position of the employer, were developed as part of the process of the “fair characterisation” of the termination of employment, with the ultimate task being to decide whether, in all the circumstances, the dismissal was "harsh, unjust or unreasonable".

55 It is important to remember, as noted by Olsson J in the extract set out above, that the words “harsh, unjust or unreasonable” are disjunctive. In this context, counsel for

the respondent drew the attention of the Full Commission to the High Court decision of Byrne where in relation to a clause of an industrial award which provided that “termination of employment by an employer shall not be harsh, unjust or unreasonable”. McHugh and Gummow JJ said:-

"It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted."

56 The concepts do not necessarily overlap. Thus a dismissal may be thought to be a reasonable option open to an employer given the facts known at the time, but may nevertheless be harsh because of the consequences for the employee, or unjust because of further information which subsequently comes to light. Hence the need for a consideration of all of the circumstances.

Section 109 of the FW Act provides the remedies where the IRCSA finds a termination is harsh, unjust or unreasonable. The primary remedy is an order of re-employment in the person’s former role. Where there is an order for reemployment, usually the person reemployed is to be remunerated for the period between the date of their termination and the date of re-employment and their conditions of employment treated as if there was no break in service. In such circumstances, the employer is entitled to repayment of any amount paid to the person on account or arising from the termination.

Where it is impracticable for an employer to reemploy a person, the IRCSA may award compensation to them not exceeding 6 month’s remuneration at the rate payable to them at the time they were terminated or $33,100 (indexed), whichever is the greater. It will rarely be feasible for a public sector agency to argue that it is impracticable for it to reemploy a person.

Prior to conducting a hearing to determine if the termination of a person from their employment was harsh, unjust or unreasonable; the IRCSA will conduct a conciliation conference between the employer and employee (and their representatives as applicable). The Commissioner or Deputy President presiding over the conference will attempt to resolve the matter without resort to a hearing. Where this is not possible, this person will refer the matter to another Commissioner or Deputy President to be heard.

The following classes of persons are excluded from the unfair dismissal jurisdiction of the IRCSA, pursuant to section 105A of the FW Act:

- non-award employees whose remuneration immediately before termination was above $66,200 (indexed);
- employees serving a period of probation or a qualifying period providing it was determined in advance, is reasonable vis-à-vis the employment and does not exceed 12 months;

18 The FW Act uses the term ‘position’ even though the PS Act does not.
19 The registry of the IRCSA maintains the indexed rate of this and other figures under the FW Act.
• persons employed on a casual basis for a short period except where they have been engaged on a regular and systematic basis for a period of at least nine months and they have or would have had a reasonable expectation of continuing employment;

• persons whose terms and conditions of employment are governed by special arrangements giving rights of review of, or appeal against, decisions to dismiss them from employment which, as a whole, provide protection that is at least as favourable to employees as the protection of the FW Act;\(^\text{20}\) and

• persons employed on a contract for a specified period or a specified task, the FW Act does not apply to termination of the employment at the end of the period or completion of the task unless the person has a clear expectation of on-going employment.

When a person wants to challenge termination of their employment in the IRCSA, they must apply to it before the end of 21 days from the date the termination takes effect.

Pursuant to the Fair Work (General) Regulations 2009, the Chief Executive of the Department of the Premier and Cabinet (“DPC”) is the declared employer of all public sector employees for the purposes of the FW Act. Thus, when former public sector employees challenge termination of their employment in the unfair dismissal jurisdiction of the IRCSA, the Chief Executive of DPC is the respondent. Public Sector Workforce Relations ("PSWR") represents the Chief Executive of DPC and agencies must refer to PSWR unfair dismissal applications they receive. PSWR will decide, in consultation with the relevant agency, whether an officer of that workplace will advocate for the Chief Executive of DPC in the IRCSA or whether to seek legal assistance from the Crown Solicitor’s Office.

Review of Prescribed Employment decisions (other than termination)

Section 62 of the PS Act provides for external review of employment decisions:

62—External review

(1) An employee aggrieved by an employment decision of a public sector agency directly affecting the employee may apply to the appropriate review body for a review of the decision.

(2) Subject to the regulations, an employee may not apply to the appropriate review body for a review of a decision unless—

(a) the employee has applied for an internal review of the decision by the agency; and

(b) the internal review has been completed, or has not commenced, as required by the regulations.

(3) The appropriate review body may decline to review a decision—

(a) if the application for review is frivolous or vexatious; or

(b) if the applicant for review has made a complaint under the Equal Opportunity Act 1984 in respect of the decision; or

(c) in circumstances prescribed by the regulations.

\(^{20}\) This provision excludes, for example, public sector employees employed pursuant to the Education Act 1972 or the Police Act 1998. It formerly excluded persons employed under the Public Sector Management Act 1995. Executive level employees remain excluded.
(4) On a review, the appropriate review body—

(a) must examine the decision on the evidence or material before the agency, but may, as it thinks fit, allow further evidence or material to be presented to it; and

(b) must determine whether, on the balance of probabilities, the decision is harsh, unjust or unreasonable; and

(c) may—

(i) affirm the decision;

(ii) in the case of a prescribed decision—rescind the decision and substitute the decision with a decision that the body considers appropriate (including a decision restoring any entitlements lost up to the time of the decision);

(iii) remit matters to the agency for consideration or further consideration in accordance with any directions or recommendations of the body.

(5) The parties to a review are not to be legally represented unless the appropriate review body considers that either party would be at a significant disadvantage in the absence of legal representation.

(6) The regulations may make provision relating to—

(a) applications for reviews under this section; and

(b) the conduct of reviews under this section.

(7) This section does not apply in circumstances prescribed by the regulations.

(8) In this section—

appropriate review body means—

(a) in the case of a prescribed decision—the Industrial Relations Commission; or

(b) in any other case—the Public Sector Grievance Review Commission;

prescribed decision means—

(a) a decision to take disciplinary action; or

(b) any decision to reduce an employee's remuneration level; or

(c) a decision to transfer an employee, or to assign an employee to different duties or a different place, made in conjunction with a decision to take disciplinary action or reduce an employee's remuneration level; or

(d) a decision to transfer an employee, or to assign an employee to a different place, that reasonably requires the employee to change his or her place of residence.

Decisions to impose disciplinary action/sanction(s) that are less serious than termination or to assign or transfer an employee following a disciplinary process are prescribed employment decisions and thus are reviewable by the IRCSA. This jurisdiction of the Commission is created by the PS Act (not the FW Act).
Employees who are aggrieved by a prescribed employment decision may apply to the IRCSA for a review of it.

The Commission will consider if, on the balance of probabilities, the decision under review was harsh, unjust or unreasonable. Refer to the discussion on these concepts under ‘Termination’ for guidance on how the IRCSA will interpret prescribed employment decisions.

If it finds that disciplinary action/sanction(s) imposed by an agency is/are harsh, unjust or unreasonable, then the IRCSA may rescind the decision and substitute it with one it considers appropriate, including restoring any entitlements lost by the employee up to the time of the decision.

DEEMED RESIGNATION

Section 52 of the Act empowers a chief executive or their delegate to terminate an employee’s employment by deeming them as having resigned. Section 52 states:

52—Resignation (other than executives)

(1) An employee of a public sector agency, other than an executive employee, may resign from his or her employment by not less than 14 days notice in writing to the agency (unless notice of a shorter period is accepted by the agency).

(2) If an employee of a public sector agency—

(a) is absent, without authority, from his or her employment for a period of 10 working days; and

(b) gives no proper written explanation or excuse for the absence to the agency before the end of that period,

the employee will, if the agency so determines, be taken to have resigned from his or her employment.

Before deciding that an employee has resigned, a chief executive or delegate must make reasonable efforts to put the employee on notice as to the intention to do so and provide them with a reasonable opportunity to submit as to why he/she should not act as intended. This means, for example, ensuring that correspondence is delivered to their last known home address.

If no submission is received from an employee or any submission received does not persuade the chief executive or delegate to change their intended course of action, they may formally decide that the employee is taken to have resigned from their employment and advise them accordingly.

Sometimes an employee who has been absent without authority for ten days or more and has not provided written explanation for the absence will attend their workplace intending to perform duties. If reliance on section 52 of the Act is being considered, management must not permit the employee to commence work and direct them to remain absent until further notice. Although it will be possible to discipline the employee on the basis of their conduct, the agency will not be able to rely on section 52 if they permit them to recommence work.

It is not necessary that a written explanation be provided personally by the employee. It might be appropriate in some circumstances, for example, for the employee’s spouse or a member of their family to provide the explanation. It is important that any explanation provided is proper - both in terms of form and substance.
PRACTICAL TIPS (see also the Schedules to this Guideline)

- There is no obligation to inform an employee that an investigation into their alleged behaviour is underway unless an investigation is at the stage where allegations are to be put to the employee. In most circumstances employees will know that their alleged conduct is the subject of investigation however there will be situations where it is prudent not to alert the employee. Examples include when it is possible that alerting them might result in the destruction of evidence.

- Employees suspected of misconduct, or whose performance is otherwise unsatisfactory, must be permitted to be accompanied by a support person during interviews.

- A chief executive or delegate may require (direct) an employee to attend at a place at a certain date and time for the purposes of an interview. Chief executives or delegates may not however direct employees to truthfully answer questions. In other words, employees have a right against self-incrimination even in disciplinary matters. Depending on the circumstances, an adverse inference may be drawn from an employee’s silence. The exception to the common law right against self-incrimination is where the Commissioner for Public Sector Employment utilises his/her powers to compel evidence under section 18 of the Act.

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

- Management or employees may tape record meetings or interviews and neither require the other’s permission to do so. It is important that any recording is done openly however as surreptitious recordings may amount to a criminal offence.

- Where necessary and relevant to an investigation, management may seize or order the return of government equipment/assets. Employees have no propriety right in government assets.

- Every effort should be made to collect material that is relevant to and supportive of allegations as soon as practicably.

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

- Persons participating in an investigation should not act as the decision-maker and/or impose a sanction/s upon an employee. Investigators should not purport to make findings, that is the role of the chief executive or delegate acting as decision-maker.

- The only valid form of sanction(s) are those issued pursuant to the Act. There is no concept of ‘first and final’ or ‘last’ warnings for employees under Part 7 of the Act. Any purported disciplinary action or sanction for unsatisfactory performance that occurs in a manner that is not consistent with the Act will be invalid and of no effect (ultra vires). Furthermore, management will generally be constrained from remedying invalid action retrospectively (i.e. by purporting to impose proper sanction/s).
• When investigating alleged unsatisfactory performance/misconduct, management may and should take into account all relevant evidence. The rules of evidence do not apply in the employment setting and therefore it is permissible to take into account hearsay (second-hand) evidence. The weight of such evidence will generally be lower than first hand evidence however.

• Agency-level policies and procedures addressing unsatisfactory performance (including misconduct) should be principle-based and should not contain detailed ‘how to’ or ‘step-by-step’ formats for managers to follow. Human Resource employees and managers need to apply fundamental principles in light of the individual circumstances at hand.

MISCELLANEOUS

Public Sector (Honesty and Accountability) Act 1995

All public sector employees are bound by various provisions of the Public Sector (Honesty and Accountability) Act 1995 (“the PS (H&A) Act”). This means they must comply with the following provisions and failure to do so will amount to misconduct/criminal conduct:

26—Duty of employees to act honestly

(1) A public sector employee must at all times act honestly in the performance of his or her duties, whether within or outside the State.

Penalty: Division 4 fine or division 4 imprisonment, or both.

(2) Subsection (1) does not apply to conduct that is merely of a trivial character and does not result in significant detriment to the public interest.

Proceedings for an offence against the PS (H&A) Act may only be brought with the consent of the Director of Public Prosecutions. A time limit of three years in which to lay charges applies however the Director may extend this period.

27—Duty of employees with respect to conflict of interest

(1) If a public sector employee has a pecuniary or other personal interest that conflicts or may conflict with the employee’s duties, the employee must disclose in writing to the relevant authority the nature of the interest and the conflict or potential conflict.

(2) A public sector employee must comply with any written directions given by the relevant authority to resolve a conflict between the employee’s duties and a pecuniary or other personal interest.

(3) Without limiting the effect of this section, a public sector employee will be taken to have an interest in a matter for the purposes of this section if an associate of the employee has an interest in the matter.

(4) Failure by an employee to comply with this section constitutes grounds for termination of the employee’s employment (but this does not derogate from any statutory provisions or other law governing the process for discipline or termination of employment of an employee).

(5) If an employee makes a disclosure of interest under subsection (1) in respect of a proposed contract—

(a) the contract is not liable to be avoided; and
(b) the employee is not liable to account for profits derived from the contract.

(6) If an employee fails to make a disclosure of interest under subsection (1) in respect of a proposed contract, the contract is liable to be avoided by the relevant Minister.

(7) A contract may not be avoided under subsection (6) if a person has acquired an interest in property the subject of the contract in good faith for valuable consideration and without notice of the contravention.

(8) This section does not apply in relation to a conflict or potential conflict between an employee’s duties and a pecuniary or other personal interest while the employee remains unaware of the conflict or potential conflict, but in any proceedings against the employee the burden will lie on the employee to prove that he or she was not, at the material time, aware of the conflict or potential conflict.

(9) In this section—

relevant authority means—

(a) in relation to an employee employed by or in a public sector agency with a chief executive (or acting chief executive)—the chief executive (or acting chief executive) of the agency; or

(b) in any other case—the relevant Minister or the nominee of the relevant Minister.

Storage and otherwise dealing with records- the State Records Act 1997 – Information Privacy Principles

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

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

Obligation to refer certain matters under the Independent Commissioner Against Corruption Act 2012 and Directions and Guidelines issued under that Act

The Independent Commissioner Against Corruption has issued Directions and Guidelines under section 20 of the Independent Commissioner Against Corruption Act 2012 (“ICAC Act”). Those Directions and Guidelines relate to obligations of a variety of persons and entities to report matters to the Office of Public Integrity (“OPI”). All public sector employees should be aware of the Directions and Guidelines.

The Directions and Guidelines of the Commissioner impose obligations on inquiry agencies, public authorities and public officers - as listed in Schedule 1 to the ICAC Act (and set out in the Directions and Guidelines), to report certain matters to the OPI. Public Officers include public sector employees.
Section 11 of the Directions and Guidelines applies to Public Officers. A Public Officer:

- Must report to the OPI any matter they reasonably suspect involves corruption in public administration;
- Must report to the OPI any matter that they reasonably suspect involves serious or systemic misconduct in public administration unless the officer knows the matter has already been reported to an inquiry agency [as defined in the ICAC Act];
- Must report to the OPI any matter they reasonably suspect involves serious or systemic maladministration in public administration unless they know it has already been reported to an inquiry agency; and
- May report matters to the OPI they reasonably suspect of involving misconduct or maladministration in public administration notwithstanding they have reported the matter to an inquiry agency if they consider it appropriate.

The terms 'corruption', 'misconduct' and 'maladministration' are defined in the ICAC Act and those definitions are repeated in the Directions and Guidelines. The definition of 'misconduct' is essentially the same as that in the *Public Sector Act 2009*.

The Directions and Guidelines provide useful information as to what a reasonable suspicion is.

Section 5 of the ICAC Act contains comprehensive definitions of 'corruption in public administration', 'misconduct in public administration' and 'maladministration' in public administration'.

'Serious or systemic misconduct' is not defined in the ICAC Act or Directions and Guidelines. These terms should be given their common, ordinary meaning. The ICAC website provides information on what is meant by 'serious or systemic misconduct': [http://www.icac.sa.gov.au/content/information-public-authorities-and-public-officers](http://www.icac.sa.gov.au/content/information-public-authorities-and-public-officers)

It is notable that the terms 'serious or systemic' appear in section 3 of the ICAC Act. Section 3(2)(b) says that although the Commissioner can perform functions in relation to any case of misconduct, it is intended that his powers be exercised in relation to serious or systemic corruption and that he refer allegations of serious or systemic misconduct or maladministration to public sector agencies to investigate or otherwise deal with.

Note that serious penalties apply under section 22 of the ICAC Act for statements that are false or misleading in a material particular or complaints or reports made in the knowledge there are no grounds.

A person who makes a complaint or report to the OPI must be mindful of the confidentiality obligations imposed by the ICAC Act. In particular, all public sector employees must acquaint themselves with the restrictions contained within section 56 of the Act. Information provided by the OPI or the ICAC to a public sector employee or an agency must be treated confidentially and in accordance with the obligations contained within section 54 of the Act.

Note that the Code of Ethics also obliges public sector employees to report to an appropriate authority, workplace behaviour that a reasonable person would suspect violates any law or represents corrupt conduct, mismanagement of public resources, is a danger to public health or safety or to the environment or amounts to misconduct.
SCHEDULE 1: BASIC DISCIPLINARY AND RELATED PROCESSES

Basic disciplinary process

1. Suspensions or allegations of misconduct arise. If necessary, an investigation ensues including, where appropriate, interview of the employee.

2. The Chief Executive or delegate considers if there is any obligation to report the matter arising under the Directions and Guidelines issued under the Independent Commissioner Against Corruption Act 2012 or Code of Ethics. If there is any obligation, the matter is reported to the appropriate authority.

3. Assuming there is no barrier to proceeding with a disciplinary process, if a chief executive or delegate suspects on reasonable grounds that an employee has committed misconduct, they put allegations to the employee in writing. The correspondence will include:
   - a summary description of and reference to the particulars of the alleged conduct;
   - evidence in support of the allegations including, where relevant, reference to any policy/ies the employee’s alleged conduct is said not to have complied with;
   - an explanation of how the alleged conduct amounts to misconduct as defined by the Act (including setting out the particular provisions of the Code of Ethics the employee’s conduct is said to contravene, and/or specifying the obligation at common law the employee’s conduct is said to have contravened or failed to comply with);
   - a reasonable opportunity to the employee to respond to the allegations. What is a reasonable period will depend on the circumstances including the volume and complexity of the allegations. Usually, in the order of 21 days will be sufficient; and
   - as enclosures, copies of documentary material relied upon in support of the allegations, except where it is not appropriate to provide such documents, in which case they are made available for inspection by the employee and/or their representative.

4. If, after objectively considering any response from or on behalf of an employee, the chief executive or delegate finds all or some of the allegations of misconduct proven on the balance of probabilities and they are minded to impose a disciplinary sanction(s), they write to the employee advising them of their findings and the intended sanction(s) and providing them a reasonable opportunity to respond. Once again, what is a reasonable opportunity will depend on the circumstances and in particular the severity of the proposed sanction(s). Usually, 14 days will be sufficient.

21 Excluding of course legal advice or other documents protected by or subject to a privilege or immunity.
5. The chief executive or delegate objectively considers any submission made by or on behalf of the employee and then makes a final decision as to the appropriate sanction. If not persuaded to do otherwise, they will act to impose the sanction(s) by advising the employee of their decision and facilitating the implementation of it/them.

6. The employee may exercise a right of review of a decision that they have committed misconduct and/or to impose a disciplinary sanction(s).

7. Documentary records are stored appropriately.

Note: where an employee’s employment has ended before a disciplinary process has either commenced or concluded, a chief executive should still proceed with the process. Where allegations of misconduct are found to be proven in such circumstances, a sanction(s) may not be imposed against the employee however a record is retained of the finding on the person’s personal file. This can be important in protecting the public sector against inappropriate re-employment of former employees.

Suspension from duty

If at any time a chief executive or delegate believes that an employee should be suspended from duty, they should put the employee on notice of the intent to do so and reasons for that intent and give them an opportunity to respond. Any response should be objectively considered by the chief executive or delegate before they effect a suspension from duty – with or without remuneration. It is sometimes appropriate to suspend an employee from duty with remuneration and at the same time give them notice of an intention to suspend without remuneration and an opportunity to respond (which will take place whilst they are suspended with remuneration). What is a reasonable period will depend on the prevailing circumstances. In most cases, seven days will be adequate. Naturally, any response must be objectively considered before the chief executive or delegate makes and effects a decision.

Transfer or assignment to alternative duties

Often, a chief executive or delegate will consider transferring or assigning an employee to alternative duties or an alternative place or places to perform their duties – either pending an investigation and/or disciplinary process or following a finding that an employee has performed their duties unsatisfactorily, including by committing misconduct. An employee must be afforded procedural fairness by being put on notice as to the intention to transfer or assign by the chief executive or delegate and given a reasonable opportunity to respond. Any response must be objectively considered before the chief executive or delegate makes and affects a decision.

Managerial directions

It is frequently appropriate that employees be issued with managerial directions pending an investigation and/or disciplinary process, whether they remain in the workplace or performing their substantive duties or otherwise. Common directions include that the employee:

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

Directions may be issued verbally or in writing and if issued verbally, should always be recorded/reiterated in writing. Employees should be warned that contravention or failure to comply with managerial directions amounts to misconduct and may render them liable to disciplinary action.
SCHEDULE 2: SAMPLE CORRESPONDENCE (DISCIPLINARY)

It is important that these samples are not viewed as templates and that you turn your mind to the individual facts and circumstances of a matter when drafting correspondence. Seek specialist advice as necessary.
Sample Letter of Allegations of Misconduct and Opportunity to Respond

[date]

PRIVATE AND CONFIDENTIAL

Mr/Ms XXXX
[Address]

Delivered in person [or delivered per courier]

Dear Mr/Ms XXXX

Allegations of Misconduct – Opportunity to Respond

I suspect on reasonable grounds that you have committed misconduct and are thereby liable to disciplinary action. I intend to decide if you are in fact liable to disciplinary action. The basis for my suspicions are as follows:

1. On or about [date] [or between about [date] and [date]] (“the said date” [or “the said period”]) you accessed numerous internet sites during working hours that were unconnected with the performance by you of your duties and some contained images of a pornographic, obscene and/or sexually explicit nature.

Particulars

a. At all material times you were an employee in [name of agency] performing the role of [title of role] at the [i.e. ASO5 classification level].

b. On the said date [or during the said period] during working hours you accessed a large number of internet sites that were unconnected with the performance by you of the duties of your role.

c. A number of the internet sites you accessed contained images of a pornographic, obscene and/or sexually explicit nature.

d. Your conduct in accessing the aforementioned internet sites occurred over substantial periods of time and when you were supposed to be performing your official duties.

e. Your conduct was contrary to the Department’s Policy on Internet Usage, in particular clause X which relates to reasonable personal usage of Government computer assets by employees to access internet sites and which strictly forbids access to certain sites including those containing information and/or images of a pornographic, obscene and/or sexually explicit nature.

I am of the view that your alleged conduct is, on its face, contrary to the following provisions of the Professional Conduct Standards in the Code of Ethics for the South Australian Public Sector (“the Code”):

- public sector employees shall use work resources and equipment efficiently and only for appropriate purposes as authorised; and
• public sector employees will not at any time act in a manner that a reasonable person would view as bringing them, the agency in which they work, the public sector or Government into disrepute; or that is otherwise improper or disgraceful.

I believe that a reasonable person would view your conduct as bringing you, the agency in which you work, the public sector and/or Government into disrepute or as otherwise disgraceful.

Contravention of the Professional Conduct Standards in the Code is misconduct as defined in the Public Sector Act 2009.

I hereby provide you with an opportunity to respond to the allegations set out in this correspondence. Any submission you desire to make must be in writing and received by me no later than close of business on [actual date – allow i.e. 21 days]. Should you choose not to or fail to make a submission, I will make a decision as to whether the allegations against you are proven on the balance of probabilities based on information and advice available to me.

In the event I find all or some of the allegations against you proven and I am minded to impose a disciplinary sanction(s) upon you, I will provide you with notice as to any sanction(s) I view as appropriate and afford you a reasonable opportunity to respond before making a final decision on that issue.

You remain suspended from duty with remuneration until further notice. The managerial directions previously issued to you remain in force. Those directions are:

• you are not to attend any workplace(s) of the [name of agency];
• you are not to contact other employees during or outside of working hours with the exception [name and details of contact person];
• you are not to discuss the allegations against you or disciplinary process with any person apart from your spouse or partner, medical practitioner(s), counsellor(s), union or legal adviser(s) or otherwise as required by law; and
• you are to remain contactable during normal working hours.

Copies of the following documents are enclosed:

• a list of the names and URLs of the internet sites accessed by on the said day [or during the said period; and
• the Department’s Policy on Internet Usage.

You and/or your representative may inspect copies of samples of images downloaded from the internet sites you are alleged to have accessed during working hours. Should you and/or your representative desire to inspect these documents, please contact [name and contact details of contact person] to make necessary arrangements.
Please contact [name and details of contact person] should you require further information.

I remind you that the Department’s Employee Assistance Program is available by contacting [name of provider and contact details].

Yours sincerely,

[signature bloc, chief executive or delegate]
Sample Letter of Findings and Notice of Intended Sanction(s) and Opportunity to Make Submissions in Response

[date]

PRIVATE AND CONFIDENTIAL

Mr/Ms XXXX

[Address]

Delivered in person [or delivered per courier]

Dear Mr/Ms XXXX

Notice of Findings of Misconduct – Intended Sanctions – Opportunity to Respond

I refer to my letter of [date] in which I set out allegations of misconduct against you and provided you with an opportunity to respond. I hereby advise my findings of fact and intended disciplinary sanctions.

I alleged that on or about [date] [or between about [date] and [date]] (“the said date” [or “the said period”]) you accessed numerous internet sites during working hours that were unconnected with the performance by you of your duties and some contained images of a pornographic, obscene and/or sexually explicit nature.

Particulars

a. At all material times you were an employee in [name of agency] performing the role of [title of role] at the [i.e. ASO5 classification level].

b. On the said date [or during the said period] during working hours you accessed a large number of internet sites that were unconnected with the performance by you of the duties of your role.

c. A number of the internet sites you accessed contained images of a pornographic, obscene and/or sexually explicit nature.

d. Your conduct in accessing the aforementioned internet sites occurred over substantial periods of time and when you were supposed to be performing your official duties.

e. Your conduct was contrary to the Department’s Policy on Internet Usage, in particular clause X which relates to reasonable personal usage of Government computer assets by employees to access internet sites and which strictly forbids access to certain sites including those containing information and/or images of a pornographic, obscene and/or sexually explicit nature.

I advised I was of the view that your alleged conduct is, on its face, contrary to the following provisions of the Professional Conduct Standards in the Code of Ethics for the South Australian Public Sector (“the Code”):
• public sector employees shall use work resources and equipment efficiently and only for appropriate purposes as authorised; and

• public sector employees will not at any time act in a manner that a reasonable person would view as bringing them, the agency in which they work, the public sector or Government into disrepute; or that is otherwise improper or disgraceful.

I advised that I believe that a reasonable person would view your conduct as bringing you, the agency in which you work, the public sector and/or Government into disrepute or as otherwise disgraceful.

I have carefully considered the following:

• the record of your internet access during the said period, which includes details of numerous non-work-related sites accessed by you including those containing images of a pornographic, obscene and/or sexually explicit nature;

• a sample of images downloaded from internet sites accessed by you during the said period; and

• the Department’s Policy on Internet Usage.

I have also carefully considered the submission made by you dated [date]. I find the allegations against you proven on the balance of probabilities.

I note you admit the misconduct as alleged. This and your cooperation during the investigation of your conduct is something you deserve credit for. In deciding upon the appropriate disciplinary sanctions for your misconduct, I take account of your admissions and also your hitherto lengthy and unblemished work history.

I am of the view that the following disciplinary sanctions are appropriate:

• a reprimand pursuant to section 55 of the Act; and

• a reduction in remuneration level by the equivalent of one increment level for a period of 12 months.

I hereby provide you with an opportunity to respond to my intention as to disciplinary sanctions. Any submission you desire to make must be in writing and received no later than close of business on [date – provide i.e. seven days]. Should you fail or choose not to make a submission, I will make a decision based on information and advice available to me.

I note that you are currently suspended from duty. You are to contact [name and details of contact person] at your earliest convenience to facilitate your return to the workplace on [date of return].

The following managerial direction previously issued to you remains in force. Those directions are:

• you are not to discuss the allegations against you or disciplinary process with any person apart from your spouse or partner, medical practitioner(s), counsellor(s), union or legal adviser(s) or otherwise as required by law; and

• until you return to the workplace, you are to remain contactable during normal working hours.
You are entitled to seek an Internal Review of my decision that you have committed misconduct pursuant to section 61 of the Act and if you remain aggrieved following that review, you may seek an External Review by the Public Sector Grievance Review Commission pursuant to section 62 of the Act.

Enclosed is a copy of sections 53, 55, 61 and 62 of the Act.

Please contact [name and details of contact person] should you require further information.

I remind you that the Department’s Employee Assistance Program is available by contacting [name of provider and contact details].

Yours sincerely,

[signature bloc chief executive or delegate]
Sample Letter Notifying of Disciplinary Sanction(s)

[date]

PRIVATE AND CONFIDENTIAL

Mr/Ms XXXX
[Address]

Delivered in person [or delivered per courier]

Dear Mr/Ms XXXX

Misconduct – Notice of Disciplinary Sanctions

I refer to previous correspondence, in particular:

- my letter to you of [date] setting out allegations of misconduct against you;
- your submission of [date] responding to the allegations;
- my letter of [date] advising of my findings of fact and intended sanctions; and
- your submission in response to the notice of intended sanctions dated [date].

I found that on or about [date] [or between about [date] and [date]] (“the said date” [or “the said period”]) you accessed numerous internet sites during working hours that were unconnected with the performance by you of your duties and some contained images of a pornographic, obscene and/or sexually explicit nature.

Particulars

a. At all material times you were an employee in [name of agency] performing the role of [title of role] at the [i.e. ASO5 classification level].

b. On the said date [or during the said period] during working hours you accessed a large number of internet sites that were unconnected with the performance by you of the duties of your role.

c. A number of the internet sites you accessed contained images of a pornographic, obscene and/or sexually explicit nature.

d. Your conduct in accessing the aforementioned internet sites occurred over substantial periods of time and when you were supposed to be performing your official duties.

e. Your conduct was contrary to the Department’s Policy on Internet Usage, in particular clause X which relates to reasonable personal usage of Government computer assets by employees to access internet sites and which strictly forbids access to
certain sites including those containing information and/or images of a pornographic, obscene and/or sexually explicit nature.

I found that your conduct was contrary to the following provisions of the Professional Conduct Standards in the Code of Ethics for the South Australian Public Sector (“the Code”):

- public sector employees shall use work resources and equipment efficiently and only for appropriate purposes as authorised; and
- public sector employees will not at any time act in a manner that a reasonable person would view as bringing them, the agency in which they work, the public sector or Government into disrepute; or that is otherwise improper or disgraceful.

I advised that I was of the view that the following disciplinary sanctions are appropriate:

- a reprimand pursuant to section 55 of the Act; and
- a reduction in remuneration level by the equivalent of one increment level for a period of 12 months.

I note that in your submission you claim that your admitted misconduct was an aberration, in response to various personal pressures you were facing during the relevant period. You submitted that a reprimand was an adequate sanction in light of your misconduct. I do not agree that a reprimand is appropriate in light of the seriousness of your misconduct, which was a course of conduct over a reasonably protracted period.

As well as being an appropriate response to the seriousness of misconduct, a disciplinary sanction must act as both a personal and general deterrent. Your misconduct was most serious and were it not for your cooperation during the investigation of your conduct, your admission, your genuine contrition and reasonably lengthy and until now, unblemished work history, I would have considered termination of employment as the appropriate remedy.

I hereby advise that I impose the following disciplinary sanctions on you:

- a reprimand pursuant to section 55 of the Act; and
- a reduction in remuneration level by the equivalent of one increment level for a period of 12 months.

This letter will serve as a record of my findings as well as the reprimand under section 55 and a copy will be retained on your personal file.

You are entitled to seek an Internal Review of my decision as to sanction, pursuant to section 61 of the Act and if you remain aggrieved following that review, you may seek an External Review by the Industrial Relations Commission of South Australia pursuant to section 62 of the Act.
Enclosed is a copy of sections 53, 55, 61 and 62 of the Act.

Please contact [name and details of contact person] should you require further information.

I remind you that the Department’s Employee Assistance Program is available by contacting [name of provider and contact details].

Yours sincerely,

[signature bloc chief executive or delegate]
Sample Letter Notifying of Intention to Suspend from Duty

[date]

PRIVATE AND CONFIDENTIAL

Mr/Ms XXXX
[Address]

Delivered in person [or delivered per courier]

Dear Mr/Ms XXXX

Suspected Misconduct – Notice of Intention to Suspend from Duty Without Remuneration

I am informed that you have been charged with the criminal offence of [offence], an offence contrary to section [section number] of the [title of legislation]. This is an offence punishable by imprisonment.

I note that you are currently suspended from duty with remuneration. I also note that your solicitor has indicated to the criminal court that you intend to plead guilty to the above-mentioned charges.

In my view, given the seriousness of the criminal allegations against you, your foreshadowed plea of guilty and the probability that following the culmination of the criminal processes, termination of your employment will be the likely outcome, I am of the view that it is appropriate to suspend you from duty without remuneration. Accordingly, it is my intention to suspend you from duty without remuneration pursuant to section 57(3)(a) of the Public Sector Act 2009 ("the Act").

I hereby provide you with an opportunity to submit to me why I should not act to suspend you from duty without remuneration. Any submission you desire to make must be in writing and received by me no later than close of business on [date – give i.e. seven days]. Should you fail or choose not to make a submission I will act on the basis of information and advice available to me.

You remain suspended from duty with remuneration until further notice. The managerial directions previously issued to you remain in force. Those directions are:

1. you are not to attend any workplace(s) of the [name of agency];
2. you are not to contact other employees during or outside of working hours with the exception [name and details of contact person];
3. you are not to discuss the allegations against you or disciplinary process with any person apart from your spouse or partner, medical practitioner(s), counsellor(s), union or legal adviser(s) or otherwise as required by law; and
4. you are to remain contactable during normal working hours.

Please contact [name and details of contact person] should you require further information.

Enclosed is a copy of section 57 of the Act.
I remind you that the Department’s Employee Assistance Program is available by contacting [name of provider and contact details].

Yours sincerely,

[signature bloc, chief executive or delegate]
Sample Letter Suspending Employee from Duty – Including Managerial Directions

[date]

PRIVATE AND CONFIDENTIAL

Mr/Ms XXXX
[Address]

Delivered in person [or delivered per courier]

Dear Mr/Ms XXXX

Suspension from Duty Without Remuneration and Managerial Directions

I refer to my correspondence of [date] where I put you on notice as to my intention to suspend you from duty without remuneration in light of the fact you have been charged with a serious criminal offence punishable by imprisonment and your solicitor has indicated to the criminal court that you intend to plead guilty to the charges.

I have carefully considered the matters set out in your correspondence and am not persuaded to alter my intended course. Accordingly, I hereby suspend you from duty pursuant to section 57(3)(a) of the Public Sector Act 2009 ("the Act"), effective close of business the date of this letter.

The managerial directions previously issued to you remain in force, namely:

- you are not to attend any workplace(s) of the [insert name of agency];
- you are not to contact other employees during or outside of working hours with the exception [insert name and details of contact person];
- you are not to discuss the allegations against you or disciplinary process with any person apart from your spouse or partner, medical practitioner(s), counsellor(s), union or legal adviser(s) or otherwise as required by law; and
- you are to remain contactable during normal working hours.

Should you contravene or fail to comply with my directions you may be liable to disciplinary action.

I advise that I will look favourably upon any application by you to engage in outside remunerative employment or other activity providing that it is appropriate including that it does not give rise to any conflict of interest between your personal interests and role as a public sector employee. I also advise that I will approve any application by you for access to your accrued entitlements to recreation or long service leave.

You are entitled to seek an Internal Review of my decision pursuant to section 61 of the Act and if you remain aggrieved following that review, you may seek an External Review by the Public Sector Grievance Review Commission pursuant to section 62 of the Act.

Enclosed is a copy of the following:

- sections 57, 61 and 62 of the Act; and
- application for leave.
Please contact [name and details of contact person] should you require further information.

I remind you that the Department’s Employee Assistance Program is available by contacting [name of provider and contact details].

Yours sincerely,

[signature bloc, chief executive or delegate]