

# Preliminary Assessments

2019

**Note:** This resource provides comprehensive information on the processes, roles and outcomes associated with managing and resolving allegations of misconduct under Section H (Workplace Values and Behaviour) of ACTPS Enterprise Agreements.

Directorates may have additional resources and policies that apply. Refer to your local HR area for more information.

# ASSESSING ALLEGATIONS OF INAPPROPRIATE WORKPLACE BEHAVIOUR OR MISCONDUCT

## The Preliminary Assessment

The Preliminary Assessment is an expedient means of determining the relevant facts to decide if, and how, to proceed with a workplace issue.

## Who should conduct a Preliminary Assessment?

Preliminary assessments should be conducted by the manager/supervisor of the individual/s in question. If the complaint relates to the manager/supervisor or there is a concern about the independence of the manager/supervisor, an alternative appropriate and independent person should be nominated to complete the assessment.

The Professional Standards Unit (PSU) may assist Directorates with preliminary assessments that:

- are of a complex or sensitive nature;
- are of a large scale;
- involve a senior ACTPS executive; or
- where there is a local conflict of interest that cannot be resolved.

## What does a Preliminary Assessment involve?

A Preliminary Assessment is **not** an investigation and should be conducted as soon as possible, be as short as is practical and should cease as soon as it becomes evident how best to handle the issue.

A Preliminary Assessment should generally be limited to having discussions with the staff member/s involved and considering the most appropriate options for resolving the workplace issue. Where this is not sufficient, it may extend to obtaining additional documents or records, talking to the individual/s who lodged the complaint to clarify the issue/s, and perhaps briefly talking to anyone who witnessed the incident, to get further information. In rare circumstances it may be necessary to adopt a more detailed approach, particularly to identify all individuals who may be involved.

The following factors should be considered in any Preliminary Assessment:

- how much time has elapsed since the workplace issue/s occurred;
- whether there is sufficient information to determine how to handle the workplace issue/s raised;
- whether alternative remedial or restorative action (e.g. an apology or mediation) is a satisfactory means of redress;
- whether the workplace issues/s should be managed via the Underperformance, Internal Review or Appeal processes within ACTPS Enterprise Agreements;
- the seriousness of the workplace issue/s and, if proven, the potential ramifications for the directorate and ACTPS;
- whether the issue/s imply the existence of a systemic problem;
- whether the issue/s are inconsistent with the conduct required of public employees set out in section 9 of the PSM Act;
- whether criminal conduct may be present;

- if the workplace issue/s is serious, but the facts are known, whether the matter can be managed rather than investigated;
- whether fraud may be present and the involvement of SERBIR is necessary (see the *ACTPS Integrity Policy*);
- whether other risks are identified (e.g. health and safety of employees, detriment to members of the ACTPS or community, reputation of the ACTPS, security of documents, employees and community members etc); and
- whether the complaint may be frivolous or vexatious.

## **Informing Employees**

The manager/supervisor will communicate the outcomes of the preliminary assessment to relevant employees. It will usually also be appropriate to advise the employee subject to the allegations that a preliminary assessment is underway so that they can provide a response or comment on any proposed course of action before a decision is made. Situations where it may not be appropriate to advise the employee include where:

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

## **Outcomes of a Preliminary Assessment**

The following outcomes of a Preliminary Assessment are possible:

- if the manager is satisfied that no further action is necessary, no further action need be taken; or
- if the manager is of the view that counselling or other alternative remedial or restorative action is appropriate, the manager should implement that action; or
- if the complaint is better resolved through the Internal Review procedures set out in ACTPS Enterprise Agreements or through some alternative mechanism (e.g. as a Public Interest Disclosure), the manager may refer the matter accordingly; or
- if the manager considers the complaint relates to performance issues, the manager may commence an underperformance process in accordance with H4 (Underperformance); or
- if the manager determines that there are allegations of potential misconduct that require investigation, the manager/supervisor will recommend to the relevant delegate that the matter should be referred to the Public Sector Standards Commissioner for investigation in accordance with clause H7 (Dealing with Allegations of Misconduct) of the ACTPS Enterprise Agreements; or
- where the manager considers the complaint to be vexatious or knowingly false, the manager/supervisor will recommend to a decision maker with appropriate delegations that action may be taken in relation to the person who made the complaint.

The preferred approach whenever possible is to resolve workplaces issues in a non-disciplinary way. When a manager or supervisor makes this decision, the employee should be advised of the workplace

issue and the proposed method of resolution, and given an opportunity to respond and provide comment. For example, the employee may agree to attend training or participate in mediation. This way, the employee is more likely to feel that they are part of the decision.

Bear in mind that not all allegations can be dealt with through alternative (non-disciplinary) action. Cases involving serious allegations, where there are contested facts, or where non-disciplinary action has been tried in the past but failed, may require that an investigation be recommended by the manager/supervisor.

In all cases, it is important that action is taken early and in a timely manner and the workplace issue is addressed in some way. A record also needs to be made of any action taken and the reasons for it.

## **Alternative remedial/restorative action**

A key means of resolving incidents in the workplace is to explore the possibility of undertaking a remedial or restorative approach. When conflict happens in the workplace, either through experiencing inappropriate workplace behaviour or poor workplace culture, working relationships and teams can often suffer from the fallout.

Restorative action can be used within the workplace both to prevent this happening in the first place and to address it when it does, enabling teams and individuals to work well together.

When a manager or supervisor determines that alternative remedial or restorative action is appropriate in addressing a workplace issue, there are a number of strategies that can be used, including, but not limited to:

- counselling;
- facilitated discussion and/or mediation;
- training;
- coaching;
- team building and cultural improvement;
- EAP support.

Taking restorative action to address workplace issues is not a “one size fits all” approach and the appropriate remedy may require careful consideration to achieve a positive and sustainable outcome. One must be mindful however, of proposing solutions that could escalate the issue and further damage working relationships between the parties involved.

Before undertaking any restorative or remedial action it is recommended that you contact your local HR area for advice and support.

## **When recommending an investigation**

While investigations should not normally be the first option, they are sometimes necessary and appropriate. However, they are not a tool to devolve responsibility for managing workplace issues, nor should they be used to address minor matters that could be resolved using non-disciplinary options. The use of a formal investigation to resolve lesser disputes or minor issues can unnecessarily

delay the resolution of a matter, restrict managerial initiative, and limit the opportunity for open dialogue and apologies between disputing parties.

Situations where investigations are appropriate include (but are not limited to):

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

In considering whether a matter requires investigation, the Referral Delegate should seek advice from the Directorate HR team. Further advice may also be sought from the ACT Government Solicitor's (ACTGS) office and/or the PSU.

### **What if a full admission is made during the Preliminary Assessment?**

The ACTPS Enterprise Agreements provide that if the employee admits to the alleged misconduct and agrees that an investigation is not required, then the Delegate can proceed to determine an appropriate disciplinary action/sanction (**subclause H2.7**). An admission requires that the employee agrees in a written admission statement that the alleged behaviour occurred and that the behaviour constitutes misconduct. The employee must waive the right to an investigation and understand that sanctions may be applied.

The matter should be referred to the PSU to take a written admission statement from the respondent. This will ensure procedural fairness to the respondent and assist the Delegate in obtaining all the facts so that an informed decision can be made regarding an appropriate sanction.

Any admissions made by the respondent must be voluntary and not arise from any threats made, real or perceived, or any inducement offered. It needs to be clear that the employee understands exactly what the allegations against them are and the consequence of making such admissions.

When deciding whether to forego a full investigation, the Delegate should also consider whether the employee may be admitting to less than what has occurred to avoid a thorough investigation.

When deciding on a disciplinary action/sanction the Delegate must consider the full circumstances of the misconduct, any mitigating factors, the employee's previous employment history, and the general conduct of the employee (**subclause H114**).

In order to provide accurate statistical data in relation to ACTPS misconduct processes, the outcome of any misconduct processes internally handled by the Directorate through admissions must be reported to the PSU.

### **Allegations involving criminal activity**

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

Responsible for Business Integrity and Risk (SERBIRs), HR teams and/or the PSU are available to assist with this process.

## **Allegations involving bullying, harassment or discrimination**

The ACTPS is committed to providing a healthy and safe working environment for its employees. All ACTPS employees are to act in a manner that is consistent with the *Work, Health and Safety Act 2011* and the RED Framework. Work bullying, harassment and discrimination will not be tolerated and any allegations will be managed in accordance with Section H.

## **Behaviour outside the workplace**

Conduct outside the workplace may amount to misconduct if there is a clear and relevant connection between the employee's out-of-hours conduct and its effect on the workplace. Of course, this must be balanced against the principle that a public sector employee is entitled to a private life outside of work. The ramifications of conduct that occurs outside the workplace will depend upon the circumstances of the case, including: the nature of conduct; whether criminal charges arise from it; and the employee's role within the ACTPS.

In assessing behaviour that occurs outside the workplace, you will need to consider whether:

- there was a clear connection between the employee's out-of-hours conduct and their employment; and
- the conduct is incompatible with the employee's duty as an employee, or is likely to cause serious damage to the employment relationship.

Directorates should articulate the expectations of employees out of hours and make it clear that inappropriate conduct may result in an allegation of misconduct. Expected standards of behaviour should be reinforced before work-related social functions.

## **The difference between underperformance and misconduct**

Underperformance means a failure to perform the duties of the position or to perform them to the required standard, including non-compliance with workplace policies, rules or procedures, poor interaction with colleagues. It is rarely a willful or deliberate act. In the first instance, underperformance can be dealt with through the provision of advice and support and a fair and transparent framework for action to improve the performance in accordance with H4 (Underperformance) of ACTPS Enterprise Agreements and the ACTPS Performance Framework.

Borderline situations between misconduct and underperformance may require an in depth Preliminary Assessment to determine the best course of action. Resolution via the underperformance processes gives the employee a better opportunity to learn and to improve. However, the particular circumstances of the case at hand may warrant a misconduct process instead. For example, underperformance may constitute misconduct if there is an additional degree of willfulness or deliberateness, gross negligence is demonstrated, or if the pattern of underperformance continues despite directions to the contrary.

In the case of continued underperformance, managers should seek assistance from their Directorate's HR team.

## **Procedural fairness**

When conducting a preliminary assessment, ensuring that all procedures are followed correctly helps prevent an employee being treated unfairly or unreasonably and having to seek an avenue of redress. In the context of alleged misconduct and action taken in relation to cases of repeated underperformance, procedural fairness requires that:

- the employee be made aware of the allegations and the process to be followed in assessing those allegations;
- the manager/supervisor provide the employee with an opportunity to comment on all evidence that is credible, relevant and significant;
- that the manager/supervisor conduct the process with an open mind, free from bias or other interest in the outcome of the process; and
- that the appointed decision delegate is similarly unbiased and free from any interest in the outcome of the process.

## **Confidentiality**

All information about an allegation of inappropriate workplace behaviour must be kept confidential before, during and after the preliminary process to help ensure fair treatment and process, minimise the risk of victimisation, help avoid defamation proceedings and to respect people's privacy. It also helps to develop and maintain employee confidence in the process.

Many allegations arise as a result of a complaint made by one employee against another. In some situations, the individual/s making a complaint may wish to remain anonymous, or the complaint may be received anonymously. In some cases public interest disclosure legislation may protect an individual's identity. Regardless, the individual/s making a complaint should always be advised that their identity may be revealed, either in the course of the preliminary assessment or through any processes that may follow. Note also that a public employee who receives an allegation of misconduct must report it, even if the individual does not wish them to. This is especially the case where the complaint presents a potential health and safety risk.

A complainant will often want to know the outcome of the preliminary assessment. In instances where a decision to investigate is made, or if a remedial solution such as counselling is implemented. In order to protect the right to privacy of the employee who is the subject of the assessment, the organisation should only inform the complainant that an investigation took place. Providing additional information such as the outcomes of an investigation, or the delegate's considerations, may be a breach of privacy. If in doubt, it may be appropriate to seek legal advice before deciding what information, if any, can lawfully be disclosed to a complainant or a third party in relation to a misconduct process.

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

## **Conflict of interest**

The principles of natural justice require that an individual undertaking a preliminary assessment must act in good faith and without bias. If an investigator has a vested interest or a prior involvement in a

matter, or a personal relationship with the parties involved in a preliminary assessment process, there may be a conflict of interest.

**Example of actual conflict** – John makes a complaint to his manager, Rebecca, that one of his colleagues is making threatening comments to him. Rebecca intends to conduct a Preliminary Assessment with regards to John’s allegations. Unbeknown to everyone, Rebecca and John are in a relationship. Rebecca has a conflict of interest in that she has a personal relationship with John, who is the complainant. As such, Rebecca should not conduct the Preliminary Assessment as there is an actual conflict of interest.

**Example of perceived conflict** – Rebecca declares her conflict of interest and withdraws from conducting the Preliminary Assessment. Rebecca then asks Sue to carry out the Preliminary Assessment. Rebecca and Sue belong to the same tennis club. As Rebecca and Sue have a connection outside of the workplace, it creates the perception of a pre-existing friendship. As such, Sue should not conduct the Preliminary Assessment as there could be a perceived conflict of interest.

## **APPENDIX A: Tips for managers/supervisors when discussing complaints with employees**

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

# **APPENDIX B: Record keeping**

## **Why is record keeping important?**

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

## **What records should be kept?**

Material placed on a file should include:

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

## **Where should these records be kept?**

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

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