

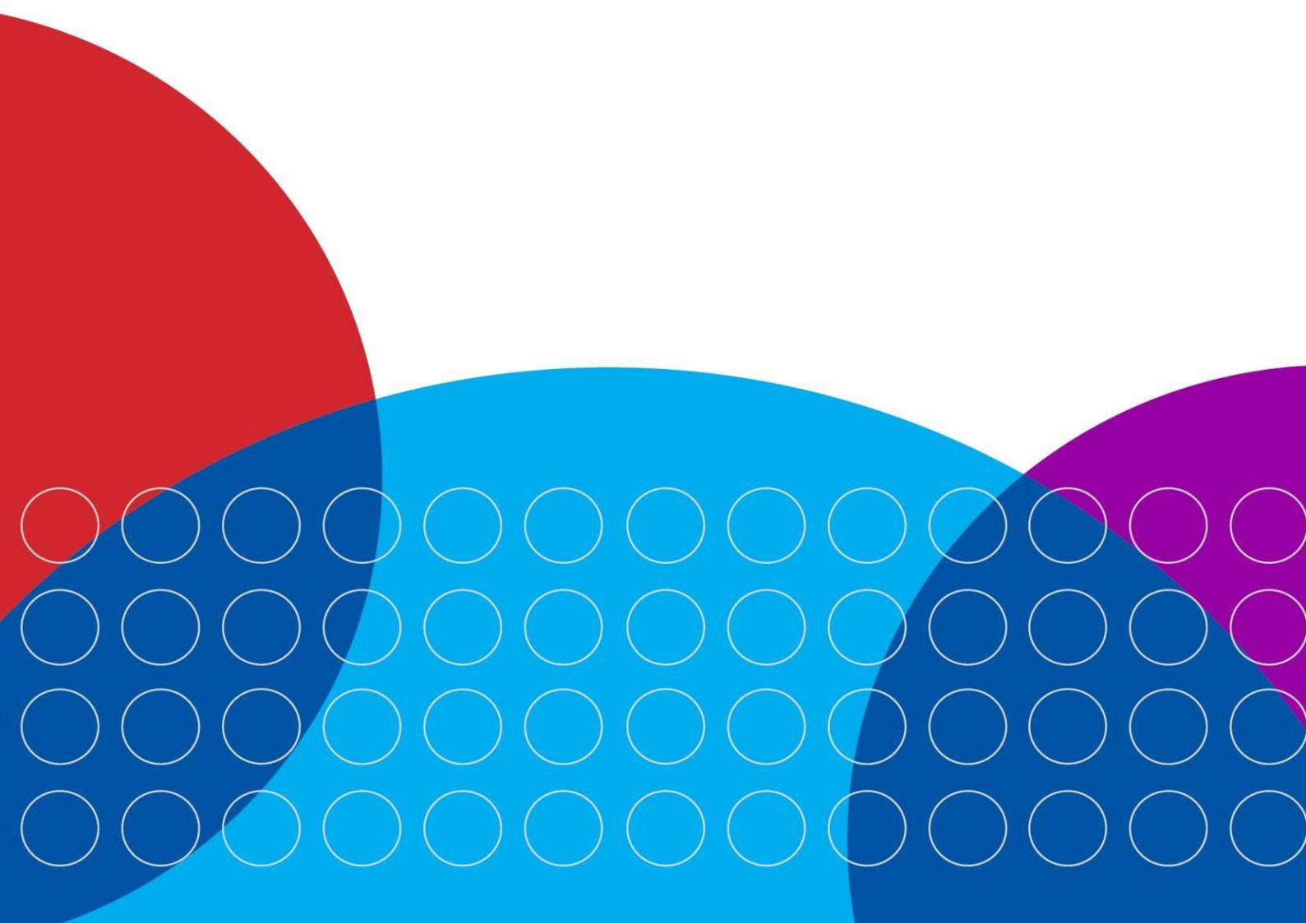


**Government
of South Australia**

Office of the Commissioner
for Public Sector Employment

GUIDELINE OF THE COMMISSIONER FOR PUBLIC SECTOR EMPLOYMENT

Management of Unsatisfactory Performance



Guideline of the Commissioner for Public Sector Employment

Management of Unsatisfactory Performance

Date of Operation: 31 March 2023

Who is covered by this Guideline?

The Commissioner for Public Sector Employment (CPSE or Commissioner) is empowered under section 14(d) of the *Public Sector Act 2009* (“PS Act”) to issue guidelines relating to public sector employment. This Guideline has particular application to employment under Part 7 of the PS Act but contains material relevant to all employment in the South Australian public sector. Additional information is provided in section 1. Introduction.

Important note about Misconduct

This guideline previously included detail on the management of misconduct. The CPSE has issued a new guideline “Management of Misconduct”. Please refer to that new guideline for detail on managing misconduct matters.

This guideline retains the previous content relevant to the management of unsatisfactory performance.

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1 INTRODUCTION

The effective management of employee performance and conduct is essential to ensuring that the South Australian public sector and its agencies meet community expectations, and deliver services effectively and efficiently.

This Guideline is intended to assist human resources practitioners, decision makers and other managers in public sector agencies to manage unsatisfactory performance.

This Guideline does not cover the management of misconduct, which is covered in CPSE Guideline: Management of Misconduct. That Guideline also deals with abandonment of employment (in Appendix C) – that is, where an employee has been absent from the workplace without authority or proper explanation or excuse and the circumstances indicate the employee has abandoned their employment.

The effective and efficient management of employee unsatisfactory performance requires the commitment of sufficient resources.

Whilst the contents of this Guideline concentrate on employment pursuant to Part 7 of the PS Act, certain content is relevant to employment across the South Australian public sector, including that relating to procedural fairness. The fundamental message the Guideline seeks to convey is that each matter at least to some degree turns on its individual facts and circumstances.

The Guideline is not a substitute for specialist human resource management, industrial/employee relations or legal advice.

This Guideline is published with the following objects of the PS 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 in the PS Act have also informed the content of this 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.*

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

1.1 PUBLIC SECTOR AND PUBLIC SERVICE

For the purposes of this Guideline, an important question to consider “is the employee a Public Servant or is their employment otherwise covered by Part 7 of the PS Act?”

The decision maker and officers assisting them must be aware of the fundamental employment status of the employee; i.e. whether their employment is covered by Part 7 of the PS Act; or if some other specific legislation imposing a similar scheme to Part 7 of the PS Act applies; or if the employment is fundamentally governed by common law principles.



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 PS 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;

In summary, Part 7 of the PS Act is applicable to:

- Public Service employees, that is employees employed in an administrative unit and whose employment is not otherwise excluded under section 25(2) of the PS Act;
- certain employees in non-Public Service agencies due to the terms of transfer instruments; and/or
- employees in public sector agencies outside the Public Service to the extent provided for by another Act (i.e. the *Courts Administration Act 1993*) or the regulations under the PS Act. Regulation 13 of the *Public Sector Regulations 2010* applies Part 7 of the PS Act to a range of other non-Public Service-employment, including any amendments as established by the relevant Regulation.

1.2 WHAT IS MISCONDUCT?

Management of misconduct is now dealt with in CPSE Guideline: Management of Misconduct.

That new guideline provides guidance on the meaning of misconduct and matters to consider when deciding whether to deal with a matter as suspected misconduct or unsatisfactory performance (see 'Preliminary considerations' in that guideline).

1.3 WHAT IS UNSATISFACTORY PERFORMANCE?

Other than conduct constituting misconduct, the term 'unsatisfactory performance' is to be interpreted broadly as referring to the inadequate performance by an employee of the duties of their role and includes consideration of the adequacy of their behaviour/conduct.

Misconduct is a form of unsatisfactory employee performance that is managed in a particular way. Some employee conduct may be legitimately characterised as unsatisfactory performance *per se* or unsatisfactory performance in the nature of misconduct.

Applying the overarching, fundamental principle that each matter is to be managed according to its individual facts and circumstances, a good example is conduct by an employee involving unsatisfactory attendance (i.e. consistent lateness for work or returning from breaks). Logically, managers would in most circumstances at least initially seek to address such conduct as unsatisfactory performance, by informal and, if necessary, formal performance management measures. However, it may become appropriate in given circumstances to address the conduct as misconduct where, for example, an employee contravenes a lawful and reasonable managerial direction.

It is important to emphasise that it is not necessary for an employee to intentionally perform unsatisfactorily. There are many examples where the cause of/reason(s) for unsatisfactory performance is out of the employee's control (i.e. illness or disability). The important consideration from a managerial perspective is to identify when employee performance (including behaviour/conduct) is unsatisfactory and acknowledge there is an obligation upon management to address it appropriately.

To assist in evaluating and developing the performance of all public sector employees, public sector agencies are required to have effective performance management and development systems in place in accordance with section 8 of the PS Act and the *Direction of the Premier: Performance Management and Development*. Further guidance on the design and implementation of effective performance management and development systems is available in the *Guideline of the Commissioner for Public Sector Employment: Performance Management and Development*.

2 FUNDAMENTAL PRINCIPLES RELATING TO THE MANAGEMENT OF UNSATISFACTORY PERFORMANCE

The principles summarised in this Guideline are informed by a variety of sources, including legislation, legal principles, awards, other industrial instruments and decisions of tribunals and courts.

Certain principles summarised in this Guideline apply to all public sector employment and others relate only to Public Service employment or other public sector employment to which Part 7 of the PS Act applies. Further, this Guideline takes into account the fact that certain cohorts of public sector employees (other than those governed by Part 7 of the PS Act) are governed to varying degrees by specific legislation.

When managing unsatisfactory performance, decision makers and those assisting them must determine the fundamental employment status of the relevant employee; i.e. whether the provisions in Part 7 of the PS Act are applicable to the employment of the employee (or if some other specific legislation imposing a similar scheme to that of Part 7 of the PS Act applies) or if the employment is fundamentally governed by common law principles.

It is important to note that there is no 'one size fits all' way to manage unsatisfactory performance.

2.1 PROCEDURAL FAIRNESS

The rules of procedural fairness, also referred to as natural justice, apply whenever the rights, interests, property or legitimate expectations of an individual are affected by an administrative (management) decision, this includes decisions relating to the management of unsatisfactory performance.

The three basic rules decision makers must adhere to are the hearing rule; the rule against bias and the no evidence rule.

2.1.1 The hearing rule

The hearing rule¹ demands that a person whose rights, interests or legitimate expectations may be adversely affected by an administrative decision has a right:

- to an opportunity to be heard before an intended decision is made;
- to receive all relevant information before a response or submission is provided by them or on their behalf;
- to have a reasonable opportunity to provide a response or submission; and
- for any response or submission provided by them or on their behalf to be objectively considered by the decision maker before any relevant decision is made and affected.

Using alleged misconduct as an example, this in part means that an employee who is alleged to have committed misconduct must be provided with:

- detailed and particularised allegations and copies of or access² to information relied upon in making the allegations;³ and
- afforded a reasonable opportunity to respond to the allegations.

It also means that where a decision maker has found on the balance of probabilities that allegations of misconduct against an employee are proven and where as a consequence they intend to impose a disciplinary sanction(s)/take disciplinary action and/or to take some other action adverse to the employee (i.e. transfer to another role or workplace):

- the decision maker must advise the employee of their findings of fact and put the employee on notice of the intended decisions; and
- afford the employee a reasonable opportunity to make submissions in respect of such intended decisions.

Any submission made by or on behalf of an employee in response to allegations must be

¹ Also refer to 'Hear the other side' Flick G (1984) Natural Justice – Principles and Practical Application – second edition, Butterworths, Sydney, p.26.

² There will occasionally be situations where it is inappropriate to provide copies of evidentiary material to an employee (e.g. when it consists of pornographic images). In such cases, the employee should be invited to inspect the material.

³ Save for information that is protected by a privilege or immunity, i.e. legal advice.

objectively and personally considered by the relevant decision maker. A decision maker will fall into error by merely adopting ('rubber stamping') the views of another person.

Similarly, where a decision maker intends to impose a disciplinary sanction(s) or take disciplinary action against an employee on the basis of proven misconduct; or to make another decision adverse to an employee on the basis of misconduct or other unsatisfactory performance; they must put the employee and/or their representative on notice as to the intended decision(s); afford them a reasonable opportunity to make submissions in response; and objectively and personally take into account any submission by them or on their behalf.⁴

2.1.2 The rule against bias

The rule against bias requires that a decision maker should be disinterested and/or unbiased in the matter to be decided. Justice should not only be done, but be seen to be done. If a fair-minded person would reasonably suspect that the decision maker has prejudged the matter, the rule is breached (referred to as 'a reasonable apprehension of bias').

A breach of this rule is most easily established when the person who is in the position of accuser is also the decision maker; participates in the investigation/decision; or gives advice throughout the course of the matter; or the decision maker does not objectively and personally perform their role but merely adopts or 'rubber stamps' the views of others.

2.1.3 The no evidence rule

The no evidence rule means, in essence that the decision that is eventually made must be based on logical probative evidence (proven on the balance of probabilities – that is, the alleged behaviour is more likely to have occurred than not). Refer to the discussion on balance of probabilities on page 24 of the CPSE Guideline: Management of Misconduct.

2.1.4 Sound administrative/managerial decision making

Decision makers must take into account all relevant considerations. Matters relevant in the context of this Guideline include the procedure adopted by the decision maker in managing or attempting to manage unsatisfactory performance; the response by or on behalf of an employee in the context of unsatisfactory performance; and the employee's relative seniority and general employment history.

Decision makers must not take into account irrelevant considerations. Matters such as an employee's political beliefs, religion, sexual orientation, ethnicity, age, caring responsibilities, pregnancy, marital status, etc. would be irrelevant considerations and if considered, would amount to unlawful discrimination.

A decision maker must also act for a **proper purpose** and is not to exercise their power unreasonably. **Reasonableness** is an essential element of valid administrative decision-making. An unreasonable decision is (in the context of administrative law) 'a decision which lacks an evident and intelligible justification'.⁵

⁴ In the context of alleged misconduct, intended sanctions(s)/disciplinary action in the event allegations are found proven can sometimes be included in the same correspondence that puts allegations to the relevant employee.

⁵ Minister for Immigration and Citizenship v Li (2013) 249 CLR 332.

3 UNSATISFACTORY PERFORMANCE

To assist in evaluating and developing the performance of all public sector employees, public sector agencies are required to have performance management and development systems in place in accordance with section 8 of the PS Act and the *Direction of the Premier: Performance Management and Development*. Further guidance on performance development and management is available in the *Guideline of the Commissioner for Public Sector Employment: Performance Management and Development*.

Evaluation of the adequacy by a public sector employee of the duties or their role includes an objective assessment of their entire conduct as a public sector employee or connected to such employment (i.e. their adherence to the Code of Ethics for the South Australian Public Sector: both the Public Sector Values and Professional Conduct Standards), not merely of how well they perform the technical aspects of their duties. This means that conduct or behaviour by a public sector employee during or connected to public sector employment may be relevant as well as how adequately they perform the technical functions of their role.

3.1 EFFECTIVELY ADDRESSING APPARENTLY MINOR UNSATISFACTORY EMPLOYEE PERFORMANCE

Wherever possible, early intervention is optimal. When a decision maker or other manager becomes aware of unsatisfactory performance by an employee they should raise this with the employee in a tactful and constructive manner at the earliest opportunity. Conduct that may constitute minor apparent misconduct (e.g. repeated attendance issues or less serious incidents of contravention or failure to comply with managerial directions) may also be dealt with as unsatisfactory performance (including misconduct). The appropriate approach is a matter for the exercise of discretion for decision makers taking into account the particular facts and circumstances.

A failure to address unsatisfactory employee performance (including conduct) in a timely manner may be construed as managerial condonation of the unsatisfactory performance and/or may render the issue(s) more difficult to manage in due course.

Unsatisfactory performance by an employee may not be wilful or entirely within the employee's control, but may be caused or contributed to by a number of work and non-work-related factors i.e.:

- interpersonal conflict with other employees;
- personal problems outside the workplace which may include an employee suffering from or escaping domestic/family violence;⁶
- poor communication and/or understanding of expected work outcomes;
- lack of knowledge and/or training;
- incapacity, illness or injury; and/or
- substance abuse, e.g. alcohol or other drugs.

Effective management of unsatisfactory performance by an employee should include:

- decision makers and other managers providing an employee with a clear and objective explanation/or demonstrating in an objective manner how it is that their performance is

⁶ The *Guideline of the Commissioner for Public Sector Employment: Domestic and Family Violence* provides additional information on supporting employees who are suffering from or escaping domestic/family violence, by helping them to maintain their employment while supporting them to take action to break the cycle of domestic/family violence.

unsatisfactory;

- management providing the employee with a clear understanding of what constitutes appropriate/satisfactory performance such as by specifying in writing expected outcomes, goals, objectives and standards; wherever reasonably possible, in a measurable way;
- identifying, where possible, the underlying cause(s) of the unsatisfactory performance; and
- providing reasonable time, assistance and support to the employee to assist them to rectify the unsatisfactory performance.

Any applicable process(es) should be as constructive and supportive as reasonably possible with a focus, wherever possible, on assisting an employee to rectify their unsatisfactory performance and perform their duties consistently in a satisfactory manner.

It is not possible to propose a specified timeframe to be provided to an employee for them to rectify their unsatisfactory performance whilst attempts are being made to manage it in either an informal or formal way; or similarly, how long a manager(s) should attempt to respond to unsatisfactory performance by way of informal measures before implementing a formal response.

Decision makers need to exercise judgement and discretion appropriate to the specific facts and circumstances and to seek specialist advice wherever necessary or prudent.

3.2 UNSATISFACTORY PERFORMANCE DUE TO SUSPECTED OR ACTUAL MENTAL OR PHYSICAL CAPACITY

Sometimes an employee's unsatisfactory performance may be due to their mental or physical incapacity. In these instances, information is required to be sought to inform the decision maker or the manager as to the employee's ability to perform their duties and may take the form of information provided by the employee's treating medical practitioner/s or specialist/s; reports from medical examinations; and/or other assessments (e.g. vocational assessments).

Decision makers and those assisting them should refer to the *Guideline of the Commissioner for Public Sector Employment – Power to Require Medical Examination* but in short, a decision maker may require an employee to undergo a medical examination(s), for example, where they either refuse to provide medical information derived by them personally or to authorise their treating practitioner(s) to share information; or where medical information derived from a treating practitioner(s) is inconsistent with the factual circumstances of the employee.

3.2.1 Authority to require an independent medical examination

Some public sector employment legislation provides authority to chief executives, agency heads or delegates to require (direct) an employee to undergo an independent medical examination. For example, for employment to which Part 7 of the PS Act applies, section 56 provides such authority, as does regulation 22(4) of the *Public Sector Regulations 2010* (depending on the circumstances). Section 56 of the PS Act empowers a decision maker to direct an employee to undergo a medical examination by an independent medical practitioner in circumstances where the employee is performing the duties of their role unsatisfactorily and it appears to the decision maker that such unsatisfactory performance may be caused by mental or physical incapacity.

For employees to whom Part 7 of the PS Act does not apply and where there is no other legislative authority empowering a decision maker to require medical examination of employees, there is a power at common law to require an employee to undergo a medical examination under certain circumstances. This includes where an employee is performing their duties unsatisfactorily and it reasonably appears such unsatisfactory performance may be caused by mental or physical incapacity. Decision makers and Human Resources practitioners assisting them should consider whether they should seek legal advice from the Crown Solicitor's Office.

3.2.2 Applicable principles

In circumstances where unsatisfactory performance by an employee is reasonably believed to be caused by mental or physical incapacity, decision makers should refer to the *Guideline of the Commissioner for Public Sector Employment – Power to Require Medical Examination* and should consider the following:

- all communications and processes must be conducted with tact and discretion and the employee is to be treated with sensitivity and respect;
- reasonable attempts should be made to ascertain medical information from the employee, as provided by their treating medical practitioner(s);
- medical information should be shared and stored appropriately, in view of its inherent confidentiality;
- an independent medical examination should be performed by a relevant medical specialist(s), not a General Practitioner. Where an employee may have a mental incapacity, they should be required to attend for examination by a psychiatrist, not a psychologist. A psychologist is not a medical practitioner;
- a panel of relevant specialists must be provided to the employee to choose from. This must contain at least two choices. (Injury Management personnel in agencies may be able to provide names of suitable medical specialists.);
- employees required to attend an independent medical examination are also required to cooperate with the medical practitioner to enable a proper examination and diagnosis/prognosis;
- for employees covered by Part 7 of the PS Act, if an employee fails, without reasonable excuse, to submit to a medical examination, they may be suspended from duty without remuneration until such time as they do submit to the examination.
- for employees not covered by Part 7 of the PS Act and who are not covered by a similar legislative regime, they may be disciplined for the failure to comply with a lawful and reasonable direction; and
- decision makers must comply with the rules of procedural fairness.

3.2.3 Direction to remain absent from the workplace

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 the case 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 work in another work location(s) or to leave and remain absent from duty until further notice, pending consideration of medical information and any further processes arising.

Employees can be permitted to work when/if they produce medical certification that they are fit and able to perform the inherent requirements of their role/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.

3.2.4 Consideration of medical information by the decision maker

In addition to any relevant legislation governing an employee's employment, the options available to a decision maker will be significantly informed by medical information derived from an employee's treating medical practitioner(s) and/or via independent medical examination(s).

Following consideration of all relevant information pertaining to an employee's unsatisfactory performance and any medical incapacity, the options available to a decision maker include:

- initiation or continuation of performance management measures;
- consideration of reasonable modifications to the employee's duties and/or workplace to allow them to perform the inherent requirements of their role/duties in a satisfactory manner;
- consideration of agreeing with the employee to amend the terms and conditions of their employment in the short, medium or long term – e.g. part time arrangements or employment in a different role;⁷
- transfer of the employee to other duties, subject to affording them procedural fairness;⁸
- for employees to whom Part 7 of the PS Act applies, reduction in the employee's remuneration level under section 53(1)(b) of the PS Act (combined with assignment or transfer of them to duties under section 47 or 9) but only after the agency (decision maker) has made reasonable endeavours to find and has failed to find suitable alternative public sector employment into which the employee may be assigned or transferred that maintains their substantive remuneration level; or
- for employees to whom Part 7 of the PS Act applies, termination of employment under section 54(1)(b) of the PS Act but only after the agency (decision maker) has made reasonable endeavours to find and has failed to find suitable alternative public sector employment into which the employee may be assigned or transferred that maintains their substantive remuneration level and only after the agency has complied with section 54(3) (inform and seek advice from the Commissioner for Public Sector Employment (CPSE)).

The requirements of the *Equal Opportunity Act 1984* (SA) and the *Disability Discrimination Act 1992* (Cth) relating to unlawful discrimination based on disability must be considered - including that employers (the Crown, through employing authorities in the form of chief executives, agency heads or delegates) must make reasonable adjustments to the role or work environment of an employee with a disability, if this will enable them to perform the inherent requirements of their position. The definition of disability is very broad and decision makers or those assisting them may consider seeking legal advice from the Crown Solicitor's Office on the application of anti-discrimination legislation.

Where medical information from the employee's treating medical practitioner/s and/or from the independent medical specialist/s confirms that the employee is unable to perform their duties satisfactorily due to medical incapacity; and it is not possible to make reasonable modifications to enable the employee to perform the inherent requirements of their role/duties; and it is not in the circumstances possible to transfer them temporarily to alternative duties and/or an alternative location(s); the employee should be directed to remain absent from the workplace and only permitted to return to work when/if they produce medical certification that they are fit and able to perform their duties without restriction, or with reasonable modifications.

⁷ This would go beyond reasonable modifications so as to permit an employee to perform the inherent duties of their substantive role and would be dependent, inter alia, on operational considerations.

⁸ And for employees employed under Part 7 of the PS Act, thereafter assign them duties under section 47 of the PS Act.

In such circumstances, an employee is not entitled to be remunerated and must access accrued entitlements to paid leave in order to be remunerated.

3.3 POSSIBLE ADVERSE ACTION IN RESPONSE TO UNSATISFACTORY EMPLOYEE PERFORMANCE

For unsatisfactory employee performance (including misconduct), not caused by mental or physical incapacity the following applies.

Where employment is covered by Part 7 of the PS Act, possible adverse action against an employee as a consequence of unsatisfactory performance (including misconduct) is:

- a reduction in remuneration pursuant to section 53(1)(c) of the PS Act; and/or
- transfer of them to a different role/duties and/or workplace(s) pursuant to section 9 of the PS Act; or
- termination of employment pursuant to section 54(1)(c) of the PS Act (following compliance with section 54(3)⁹).

For employment not covered by Part 7 of the PS Act*, possible adverse action on account of unsatisfactory performance (including misconduct) is:

- the issue of a warning (including a final warning or one of a series of warnings); and/or
- transfer to another role/duties per section 9 of the PS Act; or
- termination of employment.

In the context of any public sector employment, it may be appropriate in particular circumstances to continue with some form of formal performance management and/or require an employee to undergo particular training and/or education separate from or in addition to adverse consequences.

In relation to unsatisfactory performance caused by mental or physical incapacity the following applies.

For employment covered by Part 7 of the PS Act, possible adverse action is:

- a reduction in remuneration per section 53(1)(b), subject to compliance with section 54(2); and/or
- transfer to another role/duties and/or workplace(s); or
- termination of employment, subject to compliance with section 54(2) and section 54(3)¹⁰.

For employment not covered by Part 7 of the PS Act*, possible adverse action is:

- transfer to another role/duties and/or workplaces per section 9 of the PS Act; or
- termination of employment.

*It is noted that legislation other than the PS Act governing certain cohorts of public sector employment contain particular possible adverse outcomes for such cohorts (i.e. the *Police Act 1998*).

⁹ Where it applies.

¹⁰ Where applicable.

4 SUSPECTED ALLEGED AND PROVEN UNSATISFACTORY EMPLOYEE PERFORMANCE IN THE NATURE OF MISCONDUCT

Management of misconduct is now dealt with in the CPSE Guideline: Management of Misconduct.

5 ELEMENTS OF AN UNEXCEPTIONAL DISCIPLINARY PROCESS

Management of misconduct is now dealt with in CPSE Guideline: Management of Misconduct.

6 FORMING SUSPICIONS, PUTTING ALLEGATIONS, MAKING FINDINGS AND POTENTIAL OUTCOMES

Management of misconduct is now dealt with in CPSE Guideline: Management of Misconduct.

7 DISCIPLINARY SANCTION(S) OR ACTION

Management of misconduct is now dealt with in the CPSE Guideline: Management of Misconduct.

7.1 DIFFERENT EMPLOYMENT ARRANGEMENTS

Management of misconduct is now dealt with in the CPSE Guideline: Management of Misconduct.

7.2 SANCTIONS UNDER PART 7 OF THE *PUBLIC SECTOR ACT 2009*

Management of misconduct is now dealt with in the CPSE Guideline: Management of Misconduct.

7.2.1 Reduction in remuneration level

For employees whose employment is covered by Part 7 of the PS Act, section 53 of the PS Act 'Reduction in remuneration level' represents a possible sanction for employee misconduct (that may be combined with other options provided¹¹). 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 or for unsatisfactory performance *per se* or due to medical incapacity.

Note reference in section 53 of the PS Act to 'higher classification level' means an employee's substantive classification level.

¹¹ The reduction of an employee's remuneration or a fine is possible in respect of employment governed by certain other public sector legislation.

7.3 FORMAT FOR ISSUING A WARNING/REPRIMAND

Management of misconduct is now dealt with in the CPSE Guideline: Management of Misconduct.

7.4 MANAGERIAL CAUTION (RESPONDING ADMINISTRATIVELY TO PROVEN MISCONDUCT)

Management of misconduct is now dealt with in the CPSE Guideline: Management of Misconduct.

7.5 TRANSFER TO DIFFERENT DUTIES OR LOCATIONS

Following or during a disciplinary process or the management of unsatisfactory performance, a decision maker may form the view that it is untenable for an employee to remain in their current duties or work location.

Accordingly, a chief executive, agency head or delegate may propose that an employee be transferred to alternative public sector employment under section 9 of the PS Act.¹²

An employee must be afforded procedural fairness in respect of any intended decision to transfer them to alternative duties in the relevant circumstances. That is, they must be put on notice as to the intent to transfer them and the reasons therefore and provided with a reasonable opportunity to respond as to why this should not occur. A chief executive/agency head or delegate must objectively consider any submission from an employee prior to formally deciding to transfer or assign them to alternative duties.

7.6 TERMINATION OF EMPLOYMENT

Termination of employment is clearly the most serious disciplinary sanction or action available to an employer (in the public sector, this means an employing authority on behalf of the Crown). This option is only appropriate in circumstances where by way of the misconduct or other unsatisfactory performance, an employee has displayed an intent no longer to be bound by the terms and conditions of their contract of employment; and only following a thorough process where the employee is afforded procedural fairness.

It is recommended that formal assistance and advice be sought from a Human Resources officer when the circumstances are such that termination of an employee's employment is a possible outcome from a relevant process; or a decision maker is considering terminating an employee's employment. Decision makers and those assisting them should consider if they would be aided by legal advice and if so, whether it is prudent that such advice be sought at the earliest possible opportunity.

7.6.1 Termination of employment under Part 7 of the PS Act

For employment to which Part 7 of the PS Act applies, section 54 of the PS Act is entitled 'Termination' and contains the grounds an employee's employment may be terminated on account of. This includes misconduct and unsatisfactory performance *per se* and unsatisfactory performance caused by mental or physical incapacity. It also includes when an employee is excess to the requirements of an agency or where an employee lacks an essential qualification for performing their duties.

¹² Where an employee's employment is covered by Part 7 of the PS Act (either directly or by Regulation) an assignment of duties can occur under section 47 of the PS Act.

Section 54 states:

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.*

For employment covered by Part 7 of the PS Act and where the application of the provision has not been excluded by regulation, under section 54(3) of the PS Act, where an agency (decision maker) is proposing to terminate the employment of an employee, for any reason listed in section 54(1), they must inform the CPSE 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 CPSE about the adequacy of the processes within 14 days.

Agencies are not bound to follow the advice of the CPSE but it would not be prudent for them to do so where the CPSE advises that the processes followed are inadequate. Advice provided by the CPSE will be discoverable and may be later produced in the South Australian Employment Tribunal or a Court if an unfair dismissal application is lodged or other proceedings are initiated.

Decision makers and those assisting them and/or the CPSE 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 to be managed in a manner that maintains such privilege. This extends to not quoting from or paraphrasing the advice in briefings to decision makers or correspondence to employees or their representatives. Sometimes it is obvious that legal advice is required in light of the relative complexity of a matter and sometimes it is a prudent exercise of discretion to seek advice in light of factors such as the clear interest in maintaining the confidentiality about/the inherent sensitivity attached to a matter.

7.6.2 Abandonment of employment/determination of resignation (PS Act)

This topic is dealt with in CPSE Guideline: Management of Misconduct.

7.6.3 Frustration of contract of employment

Illness, injury or incapacity: the most common way a contract of employment is ended by way of the operation of the doctrine of frustration of contract is prolonged, indefinite absence from the workplace due to non-work related/compensable illness, injury or incapacity of an employee. If there is a reasonable likelihood that the employee will be able to return to work in a fit state to perform all of the inherent requirements of their role within a reasonable period, there must be consideration of whether it is appropriate to provide the employee with leave without pay or to consider the contract of employment ended by frustration. What is considered a reasonable period depends on the particular circumstances and relevant considerations.

Loss of an essential qualification: employees in a number of occupational groups are required to be registered with a board or other authority in order to lawfully perform the duties of their role or to maintain a particular qualification in order to perform their duties. Such a requirement is in addition to any other qualification considered essential for a role. If, for example, an employee's professional registration is cancelled, suspended or not renewed, the employee is no longer able to meet an essential term of the contract of employment.

In instances where there is merely a failure by an employee to renew professional registration by the required date, the employee should be given an opportunity to renew the registration. The employee should be treated as being on leave without pay until such time as he or she is able to demonstrate that their registration has been renewed. The employee may be allowed to utilise accrued recreation or long service leave in circumstances considered appropriate by the decision maker.

If an employee does not renew their professional registration after a reasonable opportunity has been given – it is likely their contract will have ended by way of frustration. In circumstances where an employee has, on the face of it, taken an undue time to renew professional registration or similar and it is considered their employment has not been ended by operation of the doctrine of frustration of contract, they may be liable to disciplinary action for misconduct.

Should an employee's professional registration be cancelled or suspended, it is likely there will be a basis to conclude that their contract of employment will be considered as having been ended due to the operation of the doctrine of frustration of contract. A contract of employment may similarly be ended by the operation of the doctrine of frustration of contract where the employee loses other essential qualifications, such as a licence to drive a motor vehicle.

Imprisonment: If an employee is sentenced to a term of imprisonment or remanded in custody, an employee's contract of employment is almost inevitably ended by them deeming to have resigned or the operation of the doctrine of frustration of contract.

Decision makers and/or those assisting them should consider seeking legal advice from the Crown Solicitor's Office in circumstances where a decision maker is contemplating the assertion that a contract of employment has ended by way of deemed resignation by an employee or the operation of the doctrine of frustration of contract.

8 REPORTABLE CONDUCT

8.1 REPORTING TO THE COMMISSIONER FOR PUBLIC SECTOR EMPLOYMENT

Management of misconduct is now dealt with in CPSE Guideline: Management of Misconduct.

8.2 INDEPENDENT COMMISSION AGAINST CORRUPTION AND OFFICE FOR PUBLIC INTEGRITY

Please refer to Appendix A of the CPSE Guideline: Management of Misconduct for information about reporting obligations.

8.3 CODE OF ETHICS FOR THE SOUTH AUSTRALIAN PUBLIC SECTOR

The Code of Ethics imposes obligations on all public sector employees, as follows:

Public sector employees will report to an appropriate authority workplace behaviour that a reasonable person would suspect violates any law, is a danger to public health or safety or to the environment, or amounts to misconduct. This obligation does not derogate from the obligations on public sector employees under the Directions and Guidelines issued by the Independent Commissioner Against Corruption.

8.4 INTERACTION BETWEEN DISCIPLINARY AND CRIMINAL PROCESSES

Management of misconduct is now dealt with in CPSE Guideline: Management of Misconduct.

9 REVIEW OF EMPLOYMENT DECISIONS

A public sector employee who has had their employment terminated and who:

- a) believes that the termination was harsh, unjust or unreasonable; and
- b) does not have relevant rights per specific legislation; and
- c) are not otherwise excluded from the relevant jurisdiction;

may apply for relief to the South Australian Employment Tribunal ("SAET") pursuant to section 106 of the *Fair Work Act 1994 (SA)*.

Employees employed in SA Water and the Rail Commissioner are in the Federal industrial relations jurisdiction and thus *the Fair Work Act 2009 (Cth)* applies to them.

An application to review the termination of employment will be subject to the criteria that is detailed in the relevant legislation. This Guideline does not provide advice on the processes of these tribunals.

Formal assistance and advice should be sought from Human Resources or legal advice if considered relevant in the circumstances.

9.1 EMPLOYMENT COVERED BY PART 7 OF THE PS ACT

Section 62 of the PS Act provides employees whose employment is covered by Part 7 of the PS Act with a right to apply to the SAET for external review of a reviewable employment decision, including a prescribed decision. Note that this right applies after an internal review under section 61 has occurred or otherwise in limited circumstances.

The SAET has different powers depending on whether the decision under external review is a prescribed decision or not. The SAET may:

- affirm a decision (any reviewable decision);
- remit matters to the agency for consideration or further consideration in accordance with any directions or recommendations (any reviewable decision); or
- rescind the decision and substitute a decision with one it considers appropriate, including restoring any entitlements lost by the employee (a prescribed decision).

10 TIMELINESS AND REPORTING

It is imperative that managers, in particular decision makers, address suspected misconduct (and indeed other unsatisfactory performance) on the part of employees in a timely manner. Industrial tribunals have made it clear that they expect disciplinary processes to be conducted as expeditiously as possible and that this is particularly so when employees have been suspended from duty or subject to directions to remain absent. A failure by decision makers/agencies to conduct expeditious processes can lead to arguments by or on behalf of employees that their improper conduct has been condoned. It can also lead to findings by a tribunal that there was procedural and/or substantive unfairness in the process and/or to successful claims by employees (i.e. workers compensation).

It is recognised that there are a variety of complicating factors that can inescapably extend a disciplinary or similar process, including, but not limited to:

- a related criminal investigation or other processes relating to criminal allegations (but see also below); and/or
- the involvement of other Government agencies including but not limited to orders by a relevant authority prohibiting progress of a process; and/or
- delays in obtaining necessary information that are reasonably out of the control of the decision maker or those assisting the decision maker, such as information from another/other Government agencies; and/or
- matters involving particular factual complexity and/ or collection and consideration of voluminous evidentiary material; and/or
- the fact that a key witness(es) or the employee suspected of misconduct is unavailable to assist or respond due to ill health for a period.

Even where complicating factors of the type outlined above exist in a matter, decision makers and officers should seek to expedite processes in so far as is reasonably possible. The delegation by chief executives and agency heads of decision making power in respect of alleged employee misconduct (and other unsatisfactory performance); and the use of condensed disciplinary processes where possible/appropriate are measures that should assist agencies to this end.

As part of reporting to in respect of the State of the Sector Report, agencies will be required to report on the duration of disciplinary processes relating to employees in the agency and in addition, will be asked to provide reasons for delays in particular matters (refer to Section 8.1 for additional information).

11 STORAGE AND RECORDS MANAGEMENT

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).

12 SEEKING TO ENSURE GOOD PRACTICE

Management of misconduct is now dealt with in CPSE Guideline: Management of Misconduct.