

Department of Customer Service

Misconduct Procedure

Document number: TBC | Version number: 1.1

March 2024



Misconduct Procedure

Published by the NSW Department of Customer Service

nsw.gov.au/customer-service

First published: March 2024

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1 Procedure Statement

1.1 Purpose

The NSW Department of Customer Service including Service NSW (the **Department**) Misconduct Procedure (**Procedure**) outlines the misconduct and inquiry process, and what action may be taken in the instance of suspected breaches of relevant legislation, the DCS Code of Ethics and Conduct (the **DCS Code**) and/or organisational policies and procedures.

The aim of this Procedure is to ensure that all misconduct action is administered in a prompt, fair and equitable manner consistent with legislative requirements.

1.2 Scope

This Procedure applies to employees of the following agencies:

- Department of Customer Service (DCS)
- Service NSW (SNSW)
- Office of the Independent Review Officer (IRO)
- Information and Privacy Commission (IPC)

This Procedure does not apply to employees who are on probation, temporary employees, independent contractors, skill hire/contingent labour and consultants.

However, the matters referred to in this Procedure may be used as a guide in dealing with misconduct action concerning those staff. In this regard, advice should be sought from People and Culture.

2 Procedure Components

2.1 Definitions

Term	Definition
Misconduct	<p>Misconduct is broadly considered to be wrongful, improper, or unlawful conduct, and may include (but is not limited to) a contravention of the <u>Government Sector Employment Act 2013 (NSW) (GSE Act)</u>, a breach of the GSE Code of Ethics and Conduct, organisational policies or procedures, and/or a breach of the DCS Code. It is generally characterised as conduct which is premeditated, intentional or reckless. Misconduct may include conduct of the employee that occurs while the employee was not on duty or before his or her employment.</p> <p>Refer to <u>section 69</u> of the GSE Act for the definition of misconduct.</p>
Serious misconduct	<p>Conduct that is serious misconduct includes both of the following:</p> <ol style="list-style-type: none">a) wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the employment relationship.b) conduct that causes serious and imminent risk to:<ol style="list-style-type: none">i. the health or safety of a person; orii. the reputation or viability of the employer's business. <p>Conduct that is serious misconduct includes each of the following:</p> <ol style="list-style-type: none">a) the employee, during the employee's employment, engaging in:<ol style="list-style-type: none">i. theft; orii. fraud; oriii. assault; oriv. sexual harassment.b) the employee being intoxicated at work.c) the employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment.
Serious offence	<p>An offence punishable by imprisonment for 12 months or more (<u>section 69(1)</u> of the GSE Act).</p>
GSE legislation	<p><u>Government Sector Employment Act 2013 (NSW) (GSE Act)</u> <u>Government Sector Employment Regulation 2014 (NSW) (GSE Regulation)</u> <u>Government Sector Employment (General) Rules 2014 (NSW) (GSE Rules)</u></p>

Term	Definition
<p>Corrupt conduct</p>	<p>Corrupt conduct is deliberate or intentional wrongdoing i.e. not negligence or a mistake.</p> <p>It has to involve or affect a NSW public official or public sector organisation. While it can take many forms, corrupt conduct occurs when:</p> <ul style="list-style-type: none"> • A public official improperly uses, or tries to improperly use, the knowledge, power or resources of their position for personal gain or the advantage of others; • A public official dishonestly exercises their official functions, or improperly exercises their official functions in a partial manner, breaches public trust or misuses information or material acquired in the course of their official functions; • A member of the public influences, or tries to influence, a public official to use their position in a way that is dishonest or partial; • A member of the public engages in conduct that could involve one of the matters set out in section 8(2A) of the <i>Independent Commission Against Corruption Act 1988 (NSW)</i> where such conduct impairs, or could impair, public confidence in public administration. <p>Where it is unclear whether particular alleged misconduct by an employee may also constitute corrupt conduct, specialist advice should be obtained from DCS Governance, Risk and Assurance (GRA).</p>
<p>Remedial action</p>	<p>Action taken by the employing agency in response to the conduct or actions of an employee to remedy that conduct or action, including but not limited to:</p> <ul style="list-style-type: none"> • Requiring the conduct of the employee to be monitored over a specified period of time • Counselling • Training/development
<p>Trivial</p>	<p>A trivial allegation may be, but is not limited to, an allegation that:</p> <ul style="list-style-type: none"> • Is minor in nature; or • Has no serious purpose or value; or • Is sufficiently meritless that further action would be a waste of time or cost; or • The extent of the allegation is out of proportion to the significance of the matter.
<p>Vexatious</p>	<p>A vexatious allegation can be, but is not limited to, a groundless allegation that is made to cause distress, detriment, or harassment to the respondent; or an allegation that is unduly repetitive, burdensome, or unwarranted when compared to its merits.</p>

2.2 Principles

The misconduct process is based on the procedural requirements of the GSE legislation and embodies the following principles.

2.2.1 Procedural fairness

The rules or principles of procedural fairness, also known as natural justice, have developed to ensure that decision making is fair and reasonable. Put simply, procedural fairness involves decision makers informing employees of the case against them or their interests, giving them the right to be heard (the 'hearing' rule), not having a personal interest in the outcome (the rule against 'bias'), and acting only based on logically probative evidence (the 'no evidence' rule).

2.2.2 Timelines

The misconduct process should be undertaken without undue delay. It is in the interest of the agency and the employee concerned to have the matter resolved in a timely and expeditious fashion. This is balanced against the need to ensure procedural fairness to all parties involved including ensuring that any allegations are thoroughly investigated, and appropriate time is provided to parties involved to respond to any concerns.

The factors which may influence the time it takes to progress a misconduct matter may include:

- The complexity of the matter
- Exceptional circumstances, including extensions of time or other requests by involved parties
- The need to seek internal or external expert advice, including the engagement and/or conduct of a workplace investigation by an external party
- Availability of the employee or other witnesses or parties to the matter, including due to leave and other absences
- Additional considerations or issues which may arise during the matter such as the identification of additional concerns or other issues which need to be addressed
- Request for a delay by an external agency

It is intended that non-complex matters should be completed within ninety (90) days from when the employee is notified that an inquiry has commenced. However, this timeframe may be extended noting the factors above which may influence the time taken to deal with a misconduct matter, including new issues arising during the course of an inquiry, the need to provide procedural fairness to all parties involved and the availability of witnesses.

An employee who is the subject of a misconduct inquiry will be advised of the allegation(s) as soon as possible, having regard to the nature and circumstances of the matter.

Regardless of the complexity of the matter, ninety (90) days after an employee has been notified that a disciplinary inquiry has commenced, the employee will be advised in writing of the anticipated time for the current stage to conclude. This will include an outline of the reasons for any delays or anticipated delays, subject to the need to also ensure confidentiality of personal information of other parties. Similar advice will be provided to the employee each subsequent thirty (30) days after the first advice.

The employee who has made an allegation of misconduct will be informed of any decision not to proceed with the matter as misconduct.

2.2.3 Public Interest Disclosures

The *Public Interest Disclosures Act 2022* (**PID Act 2022**) provides protections for public servants who make public interest disclosures. It outlines how public servants can make disclosures and how agencies must deal with disclosures.

Where a misconduct report is about serious wrongdoing, including:

- corrupt conduct,
- serious maladministration,
- a government sector information contravention,
- a local government pecuniary interest contravention,
- a privacy contravention, or
- a serious and substantial waste of public money, **and**
- the staff member reporting honestly and reasonably believes that the information they are providing shows (or tends to show) serious wrongdoing,

they must be given information about a Public Interest Disclosure (PID), including the [PID Policy](#) and [PID information](#) on the DCS intranet, and directed to the available [reporting options](#).

If a voluntary PID is made to a manager or disclosure officer, it should be forwarded to the DCS GRA Investigations Team as soon as possible. If a PID is made orally, a written record of the disclosure should be made and the staff member making the PID should be asked to review the written record to make sure it accurately reflects their oral report.

2.2.4 Confidentiality

Information relating to a misconduct process must be handled with sensitivity and in confidence to maintain the integrity of the process and the privacy rights of every person involved. Employees involved in a misconduct matter, including those who are interviewed about alleged misconduct, must maintain confidentiality about the interview and the case. Any employee found to have breached confidentiality requirements may have disciplinary action taken against them.

2.2.5 Each case decided on its own merit

While the misconduct process will be applied in a consistent manner, the same misconduct or serious offence conviction will not always lead to the same outcome or action. The circumstances of each case may be different and the relevance of the matter to the employee's position may differ. Previous warnings or remedial action and an employee's previous employment and service record may also be relevant to decisions about misconduct process outcomes.

3 The Misconduct Process

The procedures for dealing with the alleged misconduct of an employee covered by this Procedure are statutory in nature. As such, failure to follow or apply a step in the process *may* ultimately invalidate the final outcome.

The question of whether misconduct action may be appropriate will arise when information is received that indicates an employee may have engaged in misconduct. Details about each stage in the misconduct process are outlined below.

3.1 Stage 1 – Initial Assessment and Inquiries

The first stage in the process involves an initial assessment of the allegation(s) following inquiries and fact finding. The objective of the initial assessment is to determine whether there is sufficient and proper basis to proceed with the misconduct process. All initial assessments and inquiries must be authorised in accordance with the [DCS Human Resource Delegations \(HR Delegations\)](#). Generally, the process will be managed or conducted by the DCS Employee Relations team who report directly to the Director People Services in People and Culture.

In the case of allegations of corrupt conduct and public interest disclosures, an initial review and fact finding enquiries will generally be managed by the Manager, Investigations, or equivalent, within the DCS Governance, Risk and Assurance division. The Manager, Investigations and or Director, Investigations and Corruption Prevention will also notify the Independent Commission Against Corruption (ICAC) where required. Following initial investigations by DCS Investigations Team, if the alleged conduct does not meet the threshold of the Investigations Team to investigate the matter may be referred to Employee Relations to conduct further assessments and inquiries and manage any potential misconduct proceedings under the GSE legislative framework.

3.1.1 Conducting the Inquiry

The conduct of each initial assessment and inquiry will vary depending on the circumstances of each individual case.

An inquiry may include but is not limited to:

- A review of documentary material
- A review of CCTV footage
- Inspection of the workplace or site of incident
- Interviewing relevant persons, including any witnesses
- Interviewing the subject of the allegation(s)
- Accessing systems records

3.1.2 Making the Initial Assessment

For the purpose of the initial assessment, it is sufficient that the inquiry or fact finding establishes that the employee subject of the allegation *may* have a case to answer, in order to proceed further in the misconduct process.

However, if the inquiry or fact finding indicates that the allegation is more likely to be:

1. Vexatious or trivial, or
2. An allegation which does not amount to misconduct, or
3. An allegation where there will be difficulty in establishing the facts,

then the initial assessment should determine that the misconduct process will not proceed, and both the person making the allegation and the employee subject of the allegation (if they are aware) must be advised of the decision not to proceed by a relevant Director, People & Culture (Director of relevant HR portfolio or Director People Services), Chief People Officer or other delegated officer referred to in the DCS HR Delegations.

Where the misconduct process does not proceed, consideration will also be given to other actions which may be required to be taken based on the circumstances.

3.2 Stage 2 – Misconduct Allegations

If the initial assessment determines that there appears to be sufficient information for the misconduct process to proceed, the allegation(s) must be put to the employee and the employee must be given a reasonable opportunity to respond to the allegation(s).

In such cases the employee will be advised in writing of:

- The section of the DCS Code, policy or procedure, etc which is alleged to have been breached, and
- The particulars or details of the allegation so they have sufficient information to enable a response, and
- The action that may be taken by the agency under section 69(4) of the GSE Act (if the allegation(s) is later found to be proved).

The employee is to be offered a copy of this Procedure and upon request any other relevant policies, procedures, rules, or standards, etc.

The employee will generally be provided seven calendar days to respond in writing to the allegation(s). This may vary depending on the nature and circumstances of the matter, including but not limited to:

- The complexity of the allegation(s),
- The number of allegations,
- How old the allegation(s) is,
- Other procedural fairness considerations or developments in the matter.

A shorter period to respond is appropriate where the employee is on suspension.

3.3 Stage 3 – Findings and Proposed Action

3.3.1 Findings

At the conclusion of the inquiry phase the person exercising the employer function in accordance with the GSE legislation and the HR Delegations (the “Decision Maker”) under the GSE legislation will be required to make findings as to whether or not the allegation of misconduct has been proven to the necessary standard.

This process may be assisted by an inquiry report prepared by the investigating officer or an external professional investigator. However, it is the responsibility of the Decision Maker to determine whether or not they are satisfied that an allegation has been proven to the necessary standard based on consideration of the employee’s response and other available evidence.

Where multiple allegations of misconduct have been made against an employee, investigating officers and the Decision Maker must make separate findings for each allegation. The employee subject of the allegation(s) should be advised in writing of the findings in respect of each allegation.

In assessing the evidence and making findings, specialist advice and assistance is available from the DCS Employee Relations team.

3.3.1.1 Standard of Proof

The standard of proof is **not** the criminal standard of beyond reasonable doubt.

The standard of proof required in misconduct matters is as required in civil matters, being the “balance of probabilities”. The balance of probabilities will be met if it can be established that the allegation being made is more probable than not.

When it comes to a serious allegation of misconduct, the *Briginshaw* test is to be applied in determining the evidence required to meet the standard of proof. Put simply, the more serious the allegation and its consequences, the more persuasive the proof must be.

3.3.2 Additional Allegations of Misconduct

As a result of the inquiry process or further information becoming available, additional allegations against the employee may need to be considered after the misconduct process has already commenced. Where this occurs the GSE Rules require that each additional allegation is managed following the same process as outlined in sections 3.1 to 3.3 of this Procedure.

In most cases it will be appropriate to wait for any additional allegations to be managed under this process prior to proceeding to the next step of proposing what action is to be taken, based on a collective view of all allegations against the employee. Exceptions include where:

- The original allegation(s) is sufficiently serious that it is likely on its own to result in a preliminary decision to terminate the employee’s employment, or
- Where the additional matters are particularly complex and likely to unreasonably delay the misconduct process, or
- Where the additional allegation(s) is sufficiently minor such that it is unlikely to affect the preliminary decision regarding the original allegation, even when viewed collectively.

Similarly, as the result of the inquiry process or further information becoming available, it may also be necessary to consider allegations of misconduct against other employees. Where this occurs, the same procedural steps under the GSE Rules (and outlined in section 3 of this Procedure) need to be followed in respect of the other employee(s).

3.3.3 Proposed Action

The Investigator may include a recommendation regarding appropriate action following a finding of misconduct, but the decision regarding any proposed action under section 69(4) of the GSE Act must be made by the Decision Maker. Notwithstanding the findings of an investigation, the Decision Maker is required to turn an independent mind to the facts of the matter and the appropriateness of the investigation process. Put simply, any findings and recommendations must be carefully considered by the Decision Maker.

The disciplinary penalties under section 69(4) of the GSE Act, which may be imposed following a finding of misconduct are:

- Terminate the employment of the employee (without giving the employee an opportunity to resign)
- Terminate the employment of the employee (after giving the employee an opportunity to resign)
- Impose a fine on the employee (which may be deducted from the remuneration payable to the employee)
- Reduce the remuneration payable to the employee
- Reduce the classification or grade of the employee

- Assign the employee to a different role
- Caution or reprimand the employee

When making a determination as to what the most appropriate proposed action should be, all factors to be considered are to include:

- The facts of the case
- The nature and seriousness of the misconduct
- The degree of relevance of the misconduct to the employee’s duties
- The circumstances giving rise to the misconduct
- Any mitigating or extenuating circumstances
- The employment history
- The effect of any proposed action on the employee
- Actions taken (including range of actions imposed) for similar breaches across the agency
- The objectives and the principles of the misconduct process.

Matters such as employment records, previous warnings, and remedial actions will be taken into account when deciding whether disciplinary action is appropriate and if so, what disciplinary action should be taken.

3.3.4 Advising the employee

Where a finding is made that misconduct has **not** occurred, the employee will be advised in writing of the finding and the allegation is to be dismissed.

Where a finding of misconduct has been made, the employee is to be advised in writing:

- of the finding, and

what, if any, action under section 69(4) of the GSE Act is being proposed by the Decision Maker t and

- the opportunity to make submissions in relation to the proposed action.

The employee will generally have seven calendar days to provide any additional written information which they believe should be considered prior to deciding on a final action under section 69(4) of the GSE Act. A shorter period may be appropriate where the employee is on suspension.

Prior to the due date, an employee may advise their manager or the relevant contact person for the matter that they do not wish to provide a response and the matter will progress to the next and final stages.

The process will continue even if the employee concerned fails to respond in writing by the due date.

3.3.5 Alternative Action

In appropriate circumstances the Decision Maker may decide that instead of taking action under section 69(4) of the GSE Act, it is appropriate to:

- Take no formal action e.g. where the matter is relatively minor,
- Take no formal action but implement remedial action such as retraining,
- Place the employee on a specified period of conduct monitoring under rule 40(3) of the GSE Rules, or

- Take no formal action but provide the employee with a written reminder of the standards of conduct required in the workplace consistent with the DCS Code and the GSE Core Values and any relevant policy or procedure.

Assistance in designing the conduct monitoring plan can be provided by the DCS Employee Relations team.

If, during the specified period of conduct monitoring the employee engages in the same or similar type of misconduct which led to the period of conduct monitoring, the employee may be subject to any of the penalties available under section 69(4) of the GSE Act.

Where this is being considered the employee should be advised that action under section 69(4) of the GSE Act is being considered as a result of the repeat of the behaviour during the specified period of conduct monitoring and invited to make submissions in relation to the proposed action (in the same terms as if action under section 69(4) of the GSE Act had been originally proposed instead of a period of conduct monitoring). The Decision Maker will then be required to consider the employee's submission before making a final decision.

3.4 Stage 4 – Action

In this final stage of the process all the available information, including the employee's response to any action proposed under section 69(4) of the GSE Act (if provided), is considered and a decision made on the action that will be taken in relation to the finding of misconduct. The final decision may confirm or vary the proposed action.

The person exercising the employer function in accordance with the HR Delegations in consultation with the Chief People Officer will consider any response provided by the employee in relation to the proposed action under section 69(4) of the GSE Act. Based on the information available, the DCS Employee Relations team will make a final recommendation to the Decision Maker and the Chief People Officer on the action.

The employee will be advised in writing of the decision, its date of effect and advised to seek independent advice about the decision.

4 Interviews

4.1 Relevant Employee

Employees who are the subject of an allegation may be required to attend an interview. Interviews may be conducted at any stage after concerns are received and may occur:

- As part of the initial fact-finding process to assist with the initial assessment of whether the misconduct process should commence,
- Prior to or following receipt of an employee's response to a written allegation of misconduct, or
- For the purpose of the employee providing a response to the allegation.

Some inquiries may require an employee subject of an allegation to be interviewed more than once. In all cases the employee will be advised in writing:

- Of a proposed time and place for the interview (with at least 48 hours being given)
- That they may have a support person present (see section 4 of this Procedure)
- That a copy of the record of interview (electronic recording, transcript, or both) will be provided as soon as possible after the interview.

Interviews will be electronically recorded. Interviews must not be electronically recorded without the consent of all parties to the interview.

4.2 Witnesses

Employees who are potential witnesses may be directed to attend an interview and are obliged to comply with requests for information and to provide a witness statement, in all matters reasonably connected with their employment.

4.3 Employee attendance at interview

The inquiry process will continue if an employee fails or refuses to attend an interview or seeks to unreasonably delay an interview unless, in the opinion of the person conducting the inquiry, there are reasonable or sufficient reasons for the employee failing to attend. Where an employee has failed to attend an interview or indicated their intention to refuse to attend, specialist advice should be obtained from the DCS Employee Relations team.

4.4 Use of Interpreters

Where necessary an employee or witness may have a signing or language interpreter present, if they have a hearing impairment, or where English is their second language. Ideally Interpreters should be properly accredited, rather than family, friends, or fellow employees.

Interpreter services can be booked using the [Multicultural NSW Language Services](#), which offers face to face and remote interpreting services 24 hours a day, seven days a week. Details of booking requirements and *Interpreter Booking Form* can be found at the [Multicultural NSW website](#).

4.5 After the interview

After interviews the person conducting the inquiry will:

- Provide the employee and any witnesses with a copy of their own record of interview and invite them to read and sign all copies.
- Discuss any issues about the accuracy of the record of interview and make amendments, provided the proposed changes are consistent with the audio record, where available.

If the interview was not recorded and agreement cannot be reached on the record of interview, then the employee should be asked to submit a statement outlining their reasons for not signing the record of interview. The person conducting the inquiry should also record their reasons for not agreeing to the requested changes. These statements must be included with the record of interview.

4.6 Support Person

Employees are entitled to a support person through the misconduct process. The support person:

- May be a friend, relative, work colleague, legal representative, union delegate or union official,
- Is an observer and is not to act as an advocate,
- Is not to provide advice to the respondent/witness during an interview or meeting but may call for a break,
- Must be independent of the inquiry and cannot be someone who:
- Is potentially a witness to the case
- Has been involved in the matter
- Is in any other way not independent to the matter.

The person conducting the interview or meeting:

- Will decide whether the support person meets the above criteria and inform the employee if they are required to find an alternate support person. Should the decision be disputed then the matter will be referred to the Director People Services for a decision.
- May invite the support person to provide clarification to an employee.

Support persons must treat the matter with the same confidentiality as a respondent or witness. A support person who is an employee may have disciplinary action taken against them if it is found they have breached confidentiality requirements.

The unavailability of a particular support person will generally not be sufficient reason to delay the process unless an alternative date and time is provided that would not cause an unreasonable delay.

5 Action pending a misconduct outcome

5.1 Suspension

5.1.1 Suspension from Duty

Section 70 of the GSE Act allows the agency head or their delegate to suspend an employee from duty (with or without pay) on the following grounds:

1. while an allegation of misconduct is being dealt with and any subsequent action has been taken by the employer;
2. Where an employee has been charged with a serious criminal offence pending the outcome of those criminal matters;
3. Where the Independent Commission Against Corruption (the **ICAC**) has made a finding of corrupt conduct against an employee;
4. Where the ICAC is conducting an investigation into the conduct of an employee that may result in a finding of corrupt conduct against an employee.

The decision-maker must have regard to the Premier's Memorandum M1994-35 "Suspension of Public Employees From Duty". An employee may be suspended at any point in the misconduct process including the preliminary stages of dealing with an allegation.

Factors to take into consideration when making the decision to place an employee on suspension are outlined in the *Risk Assessment for Consideration of Section 70 Suspension* document that is provided to People Managers from People & Culture.

The decision to withhold an employee's pay while suspended should be limited to exceptional circumstances. These may include, but are not limited to:

- The employee has been remanded in custody
- The employee has admitted to serious misconduct likely to result in termination of employment
- The employee has failed to comply with reasonable directions while on a period of suspension with pay e.g. a direction to attend for interview
- The employee has interfered with, or attempted to interfere with, the inquiry process e.g. by threatening or otherwise attempting to interfere with or improperly influence a potential witness
- The employee has absented themselves from being available to report to work while on suspension with pay without prior approval e.g. by travelling interstate or overseas.

Prior to approval being sought from the relevant decision maker in line with the HR Delegations, specialist advice should be obtained from the DCS Employee Relations team regarding the appropriateness of placing the employee on Suspension or to withhold pay while suspended.

Alternatives to suspending an employee from duty may include:

- Temporary assignment and/or assignment of alternate duties
- A change in reporting line
- Employee working from an alternate location
- Any reasonable direction in relation their employment.

5.1.2 Suspension Reviews

Suspensions should be periodically reviewed, having regard to the complexity of the investigation, anticipated timeframes and new matters or issues which arise in the course of any investigation which may include:

- Availability of witnesses and employees subject of any allegation;
- Additional allegations arising in the course of an investigation;
- Involvement of external bodies such as police or the ICAC;
- Court proceedings or other related litigation;
- A downgrade in the risk assessment.

5.2 Obligations of employees on Suspension

Employees on suspension are required to make themselves available to return to work and attend meetings and/or interviews at all times during normal business hours.

Where an employee on suspension is unable to return to work, attend meetings or interviews as directed due to illness or injury, the employee is required to advise their nominated contact person at the earliest opportunity. The employee will need to also obtain a medical certificate to cover the period of illness or injury on the same basis as they would ordinarily be required to do, had they not been suspended from duty. Any failure to provide timely notification of medical incapacity will be taken into consideration where an employee requests an interview to be rescheduled. Refer to Section 7.2 of this Procedure for further information.

Where an employee on suspension needs to undertake travel which is likely to mean they are unavailable to attend for work, meetings or interviews as directed, they should notify the nominated contact person to seek approval to absent themselves. Examples may include where the employee needs to travel interstate or overseas to attend to family obligations, or where the period of suspension coincides with a period of pre-approved leave.

Employees on suspension are:

- Not to enter, or attempt to enter, any Departmental premises unless authorised to do so by the relevant manager,
- Not to contact by any means, including by a third party or staff member about the misconduct process,
- Required to maintain professional conduct in accordance with the DCS Code and comply with organisational policies and procedures, and
- Required to maintain the confidentiality requirements of the matter.

6 Notification to external agencies

6.1 NSW Independent Commission Against Corruption (ICAC)

Where the conduct may be corrupt conduct, the agency must report these matters to the Director Investigations and Corruption Prevention within the DCS GRA division who will notify conduct or allegations to the NSW ICAC where appropriate or required.

6.2 Office of the Children's Guardian

The *Children's Guardian Act 2019 No 25* requires the identification of reportable allegations and reportable convictions for the purpose of making a notification to the NSW Children's Guardian under the reportable conduct scheme. The scheme requires the notification of reportable allegations and reportable convictions to the head of the Agency as soon as practicable, and requires the head of the Agency to report the matter to the NSW Children's Guardian within 7 business days of the matter being brought to the attention of the Agency head. In addition, the agency must provide a completed inquiry report ('entity report'), or an update ('interim report') to the Children's Guardian on the status of the reportable conduct investigation within 30 calendar days of the matter being brought to the attention of the agency head. An interim report must be followed by a notification of the final outcome once the investigation is completed.

Employee Relations will co-ordinate notifications to the [Office of the Children's Guardian](#).

6.3 NSW Police

If an internal investigation identifies an alleged criminal offence, the lead investigator or the investigators Manager and or Director, is the most appropriate person to report the matter to NSW Police in the first instance.

From time to time an allegation of criminal conduct by an employee may be received directly by the employee's manager or People and Culture, where the alleged conduct is not already subject to internal investigation. Where this occurs specialist advice should be obtained from the and Corruption Prevention or DCS Legal, regarding any obligation to report the matter to NSW Police and any other relevant government agencies and regulators, as required.

7 Resignations and leave pending or during misconduct process

7.1 Resignations

Resignations submitted pending or during a misconduct process will be subject to review by the relevant Manager, in consultation with the Director People Services and may result in:

- Noting on the personnel file ‘not suitable for re-employment or not suitable for rehire in any capacity’ (includes return as an employee, independent contractor, skill hire or in any other capacity)
- Non eligibility of pro-rata extended leave, in accordance with relevant legislation.
- Non-issue of any employment related awards or certificate.

It is important to note that in accordance with section 69(5) of the GSE Act, misconduct proceedings, and actions under section 69 of the GSE Act may be taken or continued **despite** an employee resigning or otherwise ceasing to be an employee of the agency. Any such action may be expressed as a termination of employment, or otherwise as appropriate, even if the employee has ceased to be an employee of the agency.

7.2 Leave

Leave applications, other than sick leave applications, submitted pending or during a misconduct process will be subject to approval by the relevant Manager, in consultation with the Manager, People Partnerships and DCS Employee Relations.

Periods of leave such as Recreation and Extended leave which have been approved prior to the commencement of misconduct proceedings, and which may unreasonably delay misconduct proceedings, should be reviewed by the employee’s manager in consultation with the Manager, People Partnerships and DCS Employee Relations.

Where an employee takes sick leave during a misconduct process, they are required to present their manager or People Partnerships with a medical certificate to cover the period of illness or injury on the same basis as they would ordinarily be required to do so. Any failure to provide timely notification of medical incapacity will be taken into consideration where an employee requests an interview to be rescheduled. To ensure the timely resolution of the process, the Department may request clarification from the employee or their doctor regarding their capacity to continue with the misconduct process (e.g. capacity to respond to letters and/or attend associated meetings or interviews). If the sick leave is prolonged, the Department may refer the employee for an Independent Medical Examination (IME) to assess their fitness to engage in the process. From time to time the Department may introduce an alternative working protocol to address these circumstances.

8 Support

We acknowledge that being part of a misconduct process in any capacity can be challenging.

The Department provides an Employee Assistance Program (EAP) which is a confidential, counselling service designed to offer a problem-solving, solution-oriented approach to support employees with personal or work-related issues.

The EAP is staffed by independent qualified practitioners.

All employees (and their immediate family) have access to the EAP, which provides for a limited number of counselling sessions at no cost to the employee and can be provided over the phone or face-to-face.

Leaders, managers and supervisors can access Manager Assist through the EAP, which provides extra support and advice for managing people.

The DCS EAP provider details are found on the [DCS Safety and Wellbeing hub](#).

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9 Legal Rights

An employee may have the right to challenge the outcome of a misconduct process through various legal avenues including through the [Industrial Relations Commission of NSW](#).

Employees considering seeking legal redress against a misconduct action should obtain early independent advice from their union or legal representative as time limits may apply.

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10 Record Keeping

The Department will keep personnel records in accordance with reference 15.8 of the NSW State Records General Retention and Disposal Authority – Administrative Records (GA 28). That is,

- Records relating to the management of instances or allegations of misconduct where no follow-up investigation is conducted will be retained for a minimum of 7 years after the process is completed.
- Records relating to the management of instances or allegations of misconduct (not involving abuse or neglect of children) where an investigation is conducted will be retained for a minimum of 10 years after the process is completed.
- Records relating to the management of instances or allegations of misconduct involving abuse or neglect of children will be retained for a minimum of 100 years after the process is completed.

Records include:

- Advice of allegations and responses
- Investigation documentation and reports
- Notifications and referrals to external bodies
- Records of remedial and/or disciplinary action
- Records of appeals.

A copy of the misconduct findings and outcome letter will be placed on the employee's personnel file where, in the opinion of the agency, it is in the public interest to be included. In forming the opinion that it is in the public interest, the agency is to have regard to the nature and seriousness of the misconduct and the need to minimise any unnecessary or prejudicial information being kept on a person's personnel file.

11 Resources

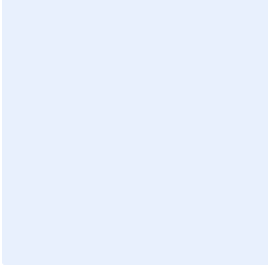
- [Children's Guardian Act 2019 \(NSW\)](#)
- [Crimes Act 1900 \(NSW\)](#)
- [DCS Code of Ethics and Conduct](#)
- [DCS Conflict of Interest Policy](#)
- [DCS Fraud and Corruption Control Plan](#)
- [DCS Fraud and Corruption Control Policy](#)
- [DCS Gifts, Benefits and Bribes Policy](#)
- [DCS Human Resource Delegations](#)
- [DCS Information Security Policy](#)
- [DCS IT Acceptable Use Policy](#)
- [DCS Managing Conflicts of Interest Procedure](#)
- [DCS Public Interest Disclosures \(PID\) Policy](#)
- [Government Information \(Public Access\) Act 2009 \(NSW\)](#)
- [Government Sector Employment \(General\) Rules 2014 \(NSW\)](#)
- [Government Sector Employment Act 2013 \(NSW\)](#)
- [Government Sector Employment Regulation 2014 \(NSW\)](#)
- [Independent Commission Against Corruption Act 1988 \(NSW\)](#)
- [Industrial Relations Act 1996 \(NSW\)](#)
- [M1994-35 Suspension of Public Employees from Duty](#)
- [NSW State Records General Retention and Disposal Authority: Administrative Records \(GA 28\)](#)
- [Office of the Children's Guardian Reportable Conduct Scheme Fact sheets](#)
- [Public Interest Disclosures Act, 2022](#)

11.1 Further Information

For further information about this procedure contact the DCS Employee Relations team at ERenquiry@customerservice.nsw.gov.au

12 Document Control

12.1 Document Approval

Name and Position	Signature	Date
Jody Grima, Chief People Officer		[Click here to enter a Date]
Graeme Head, Secretary		[Click here to enter a Date]

12.2 Document Version Control

Version	Status	Date	Author, comments
1.0	Draft	20 December 2023	Amber Chandler
1.1	Final	[Click here to enter a Date]	Amber Chandler

12.3 Review Date

This procedure will be reviewed in March 2026.

It may be reviewed earlier in response to post-implementation feedback from Business Units.