Managing workplace behaviour

A guide for agencies

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Introduction

Public sector managers and human resources staff have the difficult task of managing issues and concerns arising in relation to problematic, inappropriate or unwanted workplace behaviour. Issues can arise due to the range of human behaviours and the application of relevant legislation and human resources policies to individual circumstances.

Further, as additional information about the facts and circumstances of a matter are obtained, it may alter the view as to how best to approach the matter or require consideration of an alternative process to provide a resolution.

This guide assists managers and human resources staff in selecting the appropriate process to apply in particular circumstances. It sets out the legislative foundation, characteristics and aims of the key human resources processes used to manage grievances, substandard performance and breaches of discipline.

Rather than detailing how to conduct each process, this guide provides a framework to assist in deciding which process to use in particular circumstances.

Agencies will usually have policies which outline the process steps required. In relation to disciplinary and substandard performance processes, note that the public sector workforce is covered by a multitude of awards, statutory regimes and industrial instruments, and many of these dictate a specific process for managing inappropriate conduct. The use of these processes needs to take into account how an employee is employed and what procedural requirements may be set out.

This guide is applicable to the Western Australian public sector. While examples from Part 5 of the [*Public Sector Management Act 1994*](https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_a647.html) (PSM Act) are used throughout, Part 5 only applies to certain categories of public sector employees. Other legislation or instruments may apply to your agency.

Selecting the appropriate process

This guide considers the various pathways that are often used to address or modify inappropriate behaviour in the workplace.

Concerns regarding inappropriate employee behaviour may be raised in a certain way. For example, through lodging a grievance which may need to be addressed through additional processes, such as discipline or substandard performance.

In general terms, a grievance resolution process typically aims to resolve a breakdown in the working relationship between two colleagues. A substandard performance process attempts to improve employee performance where significant issues have been identified through an agency’s performance management system. Lastly, a disciplinary process seeks to address the breakdown in the employment relationship between employer and employee that has occurred due to the employee’s inappropriate behaviour.

All three processes are usually considered discrete, but not necessarily mutually exclusive.

An employee’s actions and the particular circumstances of the situation may indicate that more than one of these processes needs to be considered to address the issues

arising. Agencies are in the best position to determine how to deal with a matter and while considering the most appropriate process or processes to follow, consideration should be given to the proportion of an action to a given situation.

This guide should be read in conjunction with:

* Part 5, [PSM Act](https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_a647.html)
* [Public Sector Management (General) Regulations 1994](https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_s4721.html)
* [Public sector standards in human resource management – Performance management, Grievance resolution, Discipline](https://www.wa.gov.au/organisation/public-sector-commission/public-sector-standards-human-resource-management)
* [Public Sector Management (Breaches of Public Sector Standards) Regulations 2005](https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_s37434.html)
* [Commissioner’s Instruction No. 3 – Discipline – general](https://www.wa.gov.au/government/publications/commissioners-instruction-no-3-discipline-general)
* [Commissioner’s Instruction No. 4 – Discipline – former employees](https://www.wa.gov.au/government/publications/commissioners-instruction-no-4-discipline-former-employees)
* [Commissioner's Instruction 40: Ethical Foundations](https://www.wa.gov.au/government/publications/commissioners-instruction-40-ethical-foundations)

# General methodology

The assessment of an issue involves the following broad steps:

## 1. Consider readily available information

A concern may be raised either verbally or in writing. If the matter is raised verbally, it is usually advisable to let the employee talk freely and make a few simple notes. If the matter is raised in writing, the information should be reviewed and the author contacted if any clarification is required. In either case, it may then be necessary to collect some further information.

Questions to consider at this point include:

* Does the matter involve conduct that could potentially constitute either minor or serious misconduct as defined in s. 3 of the [*Corruption, Crime and Misconduct Act 2003*](https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_a6503.html) and has it been notified?
* Is it potentially a criminal matter?
* Is it likely to be a matter of considerable public interest?
* Are there any health and safety issues to consider?
* Is there any apparent conflict of interest for the manager or officer considering the matter or progressing the matter further?
* What are the expectations of those reporting concerns and how will those expectations be managed by the agency?

## 2. Make an assessment as to the primary nature of the concern or core issue

Questions to consider at this point include:

* Does the matter relate to a person’s behaviour?
* Does the matter relate to communication or official information?
* Does the matter relate to fraudulent or corrupt behaviour?
* Does the matter relate to recordkeeping or use of information?
* Does the matter relate to conflicts of interest or receiving gifts and benefits?
* Does the matter involve the inappropriate use of government resources or equipment (e.g. information technology)?
* Does the issue relate to suspected breaches of the agency’s code of conduct?
* Does it appear to be an interpersonal issue?
* Can the incident be clearly identified (time and date)?
* Does the matter relate to issues with the employee’s performance?
* Is there a need to gather or secure evidence?

## 3. Decide on the appropriate course(s) of action

The following table contrasts the differences in the various characteristics of each process to assist in defining workplace behaviour issues:

|  | Substandard performance | Grievance | Discipline |
| --- | --- | --- | --- |
| **What is the aim?** | Address continued poor work performance which is below the required standard | Address a concern (not limited to behaviour) between an employee and another employee or with an agency process or decision | Address unwanted and inappropriate behaviour in the workplace |
| **Who owns the process?** | CEO or delegate initiates the process; employee is the subject of the process (no complainant) | Complainant has a degree of ownership | CEO or delegate initiates the process. Complainant (if there is one) does not own the process |
| **What is the focus?** | Improving performance | Resolution or redress and, where applicable, prevention of recurrence | Correcting and reducing incidences of inappropriate and unwanted behaviour |
| **What sort of process?** | If employee denies performance is substandard, investigation with reference to criteria ins. 79 of the PSM Act; otherwise proceed toaction | Informal (if applicable) or formal investigation. Both would typically involve collecting information and interviewing relevant parties if required | Collecting information regarding the potential breachof discipline – substantiating or refuting thealleged breaches of discipline in amanner that protects the anonymity of information sources where possible |
| **What is involved?** | An objective assessment of whether the employee’sperformance is substandard | An assessment of the merits or otherwise of the grievance | Collecting information regarding the potential breach of discipline and a test of this information based on the balance of probability |
| **Relevant human resource standard** | Performance Management standard so far as it applies to matters relating to performance management | Grievance resolution standard | Discipline standard |
| **Potential outcomes** | If proven, potential actions may be set out in legislation or other instrument. Refer to s. 79(3) for further information. | Resolution and redress for the aggrieved party | If proven, potential actions may be set out in legislation or other instrument. Refer to s. 80A for further information. |
| **Is there a right of appeal?** | Right of appeal to the WAIndustrial Relations Commission (WAIRC) | Breach claim against the Grievance resolution standard | Right of appeal to the PSAB of the WAIRC if a government officer, otherwise the WAIRC |
| **What type of evidence might be relevant?** | Performance management plans, selection criteria, job specifications, duty statements, examples of work of the functions theemployee is required to perform and similar functions | Employee notes, memos, emails, interview transcripts | Memos, briefing notes,correspondence, emails, invoices, receipts, code of conduct, policies, reports, witness statements, interview transcripts, court proceeding outcomes |
| **Does procedural fairness apply?** | Yes | Yes | Yes |

Grievance resolution, substandard performance and disciplinary processes can overlap, insofar that they may be run simultaneously or as parallel processes, but they do seek different outcomes. Therefore choosing the appropriate process is important in view of the type of behaviour involved and outcomes desired.

‘Appendix: Workplace behaviour and issue assessment – Selecting the appropriate process’ maps a high level decision-making process to assist in determining the most appropriate response and possible pathway for managing workplace behaviour issues. It is important to gather adequate information to form a preliminary view as to which process might be best suited to dealing with the issue. Verbal advice, documentary evidence and seeking further information from relevant staff should be considered.

Some important considerations are:

* When a matter may be the subject of more than one process, a risk assessment should be undertaken as to which issue is the priority—generally if there is a relatively serious discipline matter, this would take priority.
* A grievance resolution process may reveal information that an employing authority may wish to treat as a disciplinary matter. If this occurs, a discipline process may be run in parallel with a grievance resolution process. Similarly, a grievance resolution process may uncover issues to do with an employee’s unsatisfactory performance, in which case a substandard performance process could proceed at the same time.
* Multiple performance issues do not amount to a breach of discipline. A well-functioning performance management system will include the appropriate mechanisms to address substandard performance. This will enable an agency to manage substandard performance in an integrated manner.
* The rules of procedual fairness should be carefully considered where a process may impact in an adverse way on an employee.

The following sections outline these considerations.

Procedural fairness

A process that provides and promotes procedural fairness will assist in delivering an optimal outcome.

Procedural fairness1 is a principle of common law regarding the proper and fair procedure that should apply when a decision is made that may adversely impact upon a person’s rights or interests. The principle has been developed to ensure a fair and reasonable process is applied to decisions adversely affecting an employee, such as the decision to discipline an employee, to impose an action, or to publish a report that might damage a person’s reputation. Except where procedural fairness is excluded by statute or in rare circumstances where there is an overriding public interest for a decision to be made instantaneously (For example, a serious risk to a person’s safety or the public’s safety), then procedural fairness is required.

Consequently, the principles of procedural fairness should be considered in the management of the work place and addressing behavioural issues that may arise. Processes for managing and addressing workplace behaviour, such as substandard performance and disciplinary matters may include specific requirements regarding procedural fairness.

1 Procedural fairness is a term often used interchangeably with natural justice, but natural justice is associated with courts of law, while procedural fairness is preferable for administrative decision-making.

*‘Natural justice requires that administrators adhere to a fair decision making procedure.*

*Although fair procedures tend to result in better decisions, the concern here is not whether the decision itself is fair; it is the decision-making process that must be fair.’*

*Administrative Review Council 2007*

The process rather than the outcome is the measure of procedural fairness. While there is a common law entitlement to procedural fairness the Discipline, Grievance resolution and Performance Management standards all make specific reference to the need to ensure that procedural fairness is applied to all parties. It should be noted that each of the three processes will involve some degree of preliminary consideration and investigation.

During the conduct of an investigation the rules of procedural fairness will not require a person who is the subject of an investigation to be informed of the existence or detail of the investigation by an employing authority at least at the outset, and in some cases even at completion of the investigation. Sometimes an investigation might result in an outcome that no inappropriate difficult or unwanted workplace behaviour has occurred, and the person the subject of the investigation may not even need to be informed that an investigation has taken place if that conclusion is reached.

If an employee lodges an appeal against a substandard performance or discipline process with the Public Service Appeal Board or the Western Australian Industrial Relations Commission, failure to provide an adequate level of procedural fairness may result in a direction that a disciplinary process be restarted at a particular point or that a finding be overturned. Similarly, if any employee lodges a breach of standard claim in relation to a grievance resolution process, inadequate provision of procedural fairness may result in the investigation being retracted or the decision overturned.

# Applying procedural fairness

The rules of procedural fairness require observing:

## 1. The bias rule

* The employing authority (or person requested to investigate) acts fairly and without bias.
* The employing authority (or person requested to investigate) does not hold, or is not perceived to hold, a vested or direct personal interest in the outcome of the process.

## 2. The hearing rule

* The employee is provided with notice of any allegations against them, given a reasonable opportunity to respond to those allegations or decisions affecting them, and their response is genuinely considered.

## 3. The evidence rule

* Decisions are logical and based on evidence.
* Irrelevant considerations are not taken into account in making the decision.

In a practical sense, when addressing any behavioural matter:

* the employee needs to be informed of the specific allegations in sufficient detail so that they can respond appropriately
* confidentiality is very important and protects the presumption of innocence
* the employee has a ‘right of reply’ to the allegations and any proposed findings and sanctions
* all processes should be transparent and capable of review
* the employee should be provided access to any information or evidence that may form the basis for an adverse finding
* an employee has the right to request a support person or representative during any formal process
* all decisions must be made without bias and with due consideration of all the evidence.

Adhering to the principles of procedural fairness will help to ensure that any decisions made are defensible.

# Key resources

* [Guidelines Procedural Fairness (Natural Justice)](http://www.ombudsman.wa.gov.au/Publications/Documents/guidelines/Procedural-fairness-guidelines.pdf), Ombudsman Western Australia
* [A guide to the disciplinary provisions contained in Part 5 of the PSM Act](https://www.wa.gov.au/government/publications/guide-the-disciplinary-provisions-contained-part-5-of-the-psm-act), Public Sector Commission
* [Decision Making: Natural Justice (Best Practice Guide 2)](https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Pages/practice-guides/arc-best-practice-guide-2-natural-justice.aspx), Administrative Review Council (Commonwealth)
* [Managing Poor Behaviour in the Workplace](https://vpsc.vic.gov.au/resources/managing-poor-behaviour-in-the-workplace/), State Services Authority (Victoria)

Grievance

Employees may become aggrieved by any number of situations that arise in the workplace. While most conflicts will be resolved at an interpersonal level with limited management intervention, in some cases an employee may feel that no resolution is possible through informal means or so aggrieved that they lodge a formal grievance with their employer.

# What constitutes a grievance?

An employee may lodge a grievance in relation to such matters as interpersonal issues, workplace decisions and workplace processes. In the context of workplace decisions and processes, grievances typically occur when employees disagree with outcomes or the process undertaken, which leads to an outcome. For example, a recruitment outcome. In the context of workplace behaviour, grievances typically occur when the collegial relationship between colleagues breaks down due to disagreement or confrontation.

Some indicative behaviour that may cause grievances to arise includes:

* intimidation (body language, tone)
* threats
* offensive remarks about race, gender, religion, impairment and personal appearance
* shouting
* teasing
* withholding information needed to perform work
* isolating employees
* sabotaging someone’s work or taking credit for someone else’s success
* maliciously assigning tasks
* degrading work tasks
* unproductive criticism.

Many of these actions, if substantiated, may also be grounds for the employer to consider commencing a disciplinary process.

# Grievance under the PSM Act

Under s. 29(1)(i) of the PSM Act chief executive officers are required to ‘…resolve or redress the grievances of employees…in that department or organisation…’, however there is no prescribed method for resolving grievances. It is preferable that conflicts are resolved at the lowest level of formality possible in the circumstances. Grievance resolution processes should be managed by an internal policy that aims to resolve breakdowns in the working relationship between employees while maintaining consistency and fairness in the approach taken to resolve issues. By emphasising positive relationships, managing conflicts early and communicating to employees openly, it is less likely a formal resolution process will need to be used.

# Associated instruments

The minimum standards of merit, equity and probity set out in the Grievance resolution standard need to be met.

# When to use the grievance resolution process

An agency policy will detail how a grievance is to be managed. While such policies vary, they should be consistent with the Grievance resolution standard and typically include information on how to manage grievances informally and formally, and detail the responsibilities of those who manage the grievance.

Managers need to consider whether issues arising from a grievance matter should be considered further and possibly addressed through an alternative process. In some cases a grievance resolution process uncovers behaviour that may warrant the commencement of a disciplinary process.

Agencies may also have their own definition of what can be handled by a formal grievance resolution process within their policy, and therefore, while a matter may be lodged as a grievance, it may need to be considered through an alternative process. While there is no definition of what constitutes a grievance, there are instances where a formal grievance resolution process is not the appropriate method for resolving an employee’s complaint.

It is important to be mindful of what a particular process can and cannot deliver. The grievance resolution process should deliver resolution and redress; it cannot deliver formal sanctions.

All employing authorities have a legal right to direct and control how work is undertaken, and managers have a responsibility to monitor workflow and give feedback on performance. Feedback provided with the intention of assisting employees to improve performance or workplace behaviour (in an objective and constructive way that is neither humiliating nor threatening) does not constitute grounds for lodging a grievance.

Examples of reasonable management action include:

* performance management processes
* action taken to transfer an employee
* the issuing of a lawful direction
* disciplinary action
* the appropriate allocation of work tasks
* managing an employee who may be injured or unwell
* business processes, such as workplace changes or restructuring.

# Key resources

* [Prevention of workplace bullying in the WA public sector – A guide for agencies](https://www.wa.gov.au/government/publications/prevention-of-workplace-bullying-the-wa-public-sector), Public Sector Commission
* [Dealing with bullying at work – A guide for workers](https://www.commerce.wa.gov.au/publications/guidance-note-dealing-workplace-bullying-guide-workers), Department of Mines, Industry Regulation and Safety

Substandard performance

Public sector organisations benefit greatly from performance management systems that encourage and support employees working at an optimal level. Effective performance management also assists in identifying and addressing performance that does not consistently meet expectations.

Under the PSM Act, chief executive officers and chief employees are required to evaluate the performance of employees. Various regimes exist for dealing with substandard performance, whether prescribed by common law, industrial agreements or legislation.

# Substandard performance under the PSM Act

Part 5 of the PSM Act provides a process and actions that may be implemented in certain circumstances where an employee’s performance is determined to be substandard. It applies to:

* public service officers appointed under Part 3 of the PSM Act
* ministerial officers appointed under Part 4 of the PSM Act
* members of teaching staff and persons appointed as ‘other officers’ under s. 239 of the [*School Education Act 1999*](https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_a1960.html)
* any employees prescribed in the [Public Sector Management (General) Regulations 1994](https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_s4721.html)

It is important to determine whether employees are covered by the PSM Act in relation to performance management generally or Part 5 of the PSM Act in relation to substandard performance. Different rules and processes apply in relation to substandard performance across the public sector, depending on the industrial arrangements under which the person is employed.

Substandard performance has a specific meaning under the PSM Act applicable to those employees subject to Part 5 of the PSM Act. Section 79(1) of the PSM Act defines substandard performance as being performance where ‘the employee does not, in the performance of the functions that he or she is required to perform, attain or sustain a standard that a person may reasonably be expected to attain or sustain in the performance of those functions’.

Before an employer can take action under s. 79(3) of the PSM Act, an investigation may be required to establish whether the work performance meets the definition of substandard performance.

Agencies should ensure adequate performance management processes are in place and that concerns are brought to the employee’s attention, with the employee afforded the opportunity to respond. Once the issues have been discussed, the employee needs to be given reasonable opportunity to improve their work performance before any sanctions can be considered.

# Associated instruments

The Performance management standard applies to the management of performance generally and is therefore applicable to that extent, but does not apply to decisions taken in relation to substandard performance. It concerns procedural fairness in the performance management process and establishes the minimum procedural requirements to be followed by employing authorities in dealing with the performance of employees.

# When might performance be considered substandard?

Generally, substandard performance refers to situations where an employee does not meet the requirements or expectations of their job. This might be of a temporary or ongoing nature and occur for a wide variety of reasons. Some examples of substandard performance include:

* employee fails to complete work in a sustained manner to an expected standard or agreed timeframes
* employee is unable to work unsupervised
* employee fails to adhere to agency processes for service delivery due to a skill or knowledge deficit.

# What causes substandard performance?

There are a range of reasons why employee work performance may be substandard. These include:

* employee-related causes (e.g. insufficient or inappropriate skills sets; insufficient motivation; personal relationships at work; medical reasons)
* organisation-related causes (e.g. ineffective organisational systems and performance management processes; poor workplace culture; lack of role clarity; interpersonal conflict).

# When to use the substandard performance process

Substandard performance management, including as defined under s. 79 of the PSM Act, is used to address consistently unsatisfactory work performance. It should not be confused with other types of employee behaviour or actions, such as misconduct or breach of an agency code of conduct which should be managed through the discipline process.

Unsatisfactory performance may exist concurrently with other actions or claims (such as a grievance resolution or disciplinary process). In these instances, care should be taken to ensure that the matters are dealt with under the most appropriate process (see ‘Appendix: Workplace behaviour and issue assessment – Selecting the appropriate process’). On occasion, this may result in one process being suspended until another process has been completed. Consideration to this should be given on a case-by-case basis and with reference to any applicable agency policy.

# Key resources

* PSM Act, especially s. 29(1)(i) and (ja); Part 5
* [Public Sector Management (Breach of Public Sector Standards) Regulations 2005](https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_s37434.html)
* [Public sector standard in human resource management](https://www.wa.gov.au/organisation/public-sector-commission/public-sector-standards-human-resource-management) – Performance management

Discipline

Establishing a system concerning workplace behaviour, usually through an agency’s code of conduct, is an important aspect of the governance framework for an agency. Providing a workplace with minimal conflict and free of corruption assists employees to deliver services to the community efficiently and effectively.

Behaviour and actions considered to be breaches of an agency’s code of conduct or breaches of the [Commissioner's Instruction 40: Ethical Foundations](https://www.wa.gov.au/government/publications/commissioners-instruction-40-ethical-foundations) are breaches of discipline under the PSM Act, and need to be addressed to assist with the continued good functioning of the agency’s service delivery.

One of the key differences between such behaviour and general performance issues is that such acts are of commission or omission. Examples of breaches of discipline include:

* intentionally disobeying a lawful managerial instruction
* taking stationery for private use
* improper access to personal information (departmental database)
* improper use of government resources (email, web, social media, vehicle)
* failure to declare or appropriately manage a conflict of interest
* inappropriate behaviour (front desk officer acting rudely to a client)
* dishonesty (falsification of timesheets, claim forms)
* harassment or bullying
* misuse of alcohol or drugs impacting on work performance
* criminal conduct (theft, fraud, destruction of property, offences against the person).

Public sector employees are covered by a number of awards, statutory regimes and industrial instruments, and many of these prescribe a specific process for managing inappropriate conduct. Disciplinary processes need to take into account careful consideration of how an employee is employed and the procedural requirements set out.

# Discipline under the PSM Act

Part 5 of the [PSM Act](https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_a647.html) contains a statutory discipline process that must be followed by employing authorities in relation to:

* public service officers appointed under Part 3 of the PSM Act
* ministerial officers appointed under Part 4 of the PSM Act
* members of teaching staff and persons appointed as ‘other officers’ under s. 239 of the [*School Education Act 1999*](https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_a1960.html)
* any employees prescribed in the [Public Sector Management (General) Regulations 1994](https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_s4721.html)

It is important to determine whether your agency’s employees are covered by Part 5 of the PSM Act. Different rules and processes apply in relation to discipline processes across the public sector, depending on the industrial arrangements under which the person is employed.

# Associated instruments

[Commissioner’s Instruction No.3 – Discipline – general](https://www.wa.gov.au/government/publications/commissioners-instruction-no-3-discipline-general) and [Commissioner’s Instruction No.4 – Discipline – former employees](https://www.wa.gov.au/government/publications/commissioners-instruction-no-4-discipline-former-employees) are specifically relevant in addressing Part 5 disciplinary matters. These Commissioner’s instructions establish the minimum procedural requirements to be followed by employing authorities in dealing with suspected breaches of discipline under Part 5 of the PSM Act. Commissioner’s Instruction No.4 – Discipline – former employees only has application where an employing authority is commencing or continuing disciplinary proceedings in relation to a person no longer employed by that public sector body.

The [Discipline Standard](https://www.wa.gov.au/government/publications/discipline-standard) concerns procedural fairness in the discipline process and applies to all disciplinary processes carried out in the WA public sector.

# What constitutes a breach of discipline?

Section 9 of the PSM Act identifies the principles of conduct that are to be observed by all public sector bodies and employees, and is relevant when considering possible breaches of discipline under s. 80 of the PSM Act. Summarised, an employee may commit a breach of discipline by:

* disobeying or disregarding a lawful order (one that is given by an appropriate person, for example, a supervisor to an employee)
* contravening either the PSM Act, any public sector standard or the Code of Ethics
* committing an act of misconduct (misconduct under the PSM Act relates to conduct considered to be improper or immoral by the standards of ordinary people)
* being negligent or careless in the performance of duties (e.g. not following safety procedures or misplacing confidential documents).
* committing an act of victimisation as defined under the [*Public Interest Disclosure Act 2003*](https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_a6372.html)

# When to use the discipline process

In many cases, particularly those which are less serious and the suspected behaviour of the employee is unintentional or atypical, it may be more effective for a manager to deal directly and informally with the employee about their conduct. Improvement action (such as issuing a counselling letter or directing an employee to attend training) can be taken at any time. Notification of the potential breach should still be communicated to the employing authority or delegate for consideration unless agency policy provides otherwise.

The PSM Act allows the employing authority to exercise his or her judgement in determining whether an issue warrants being dealt with as disciplinary matter.

For further information regarding the PSM Act disciplinary process, see the Commission’s Guide to the disciplinary provisions contained in Part 5 of the PSM Act. This guide aims to assist human resources officers or other persons responsible for undertaking Part 5 disciplinary processes in public sector agencies. Disciplinary investigations under Part 5 of the PSM Act – A guide for agencies provides further general information on conducting disciplinary investigations.

Practitioners undertaking a disciplinary process outside of Part 5 of the PSM Act may find these guides a useful resource, but must ensure that they do not apply the commentary relating to provisions of the PSM Act or Commissioner’s instructions where these provisions do not apply.

# External notifications

Under the *Corruption, Crime and Misconduct Act 2003* (CCM Act), principal officers of notifying authorities are required to:

* notify the PSC of all reasonable suspicions of minor misconduct (s. 45H CCM Act)
* Notify the Corruption and Crime Commission of serious misconduct (s. 28 CCM Act)

Notifications must be made as soon as is reasonably practical.

Any information that indicates criminal conduct should be immediately referred to the Western Australia Police for advice and possible investigation.

It should be noted that where a matter of public administration is identified as an issue, the Ombudsman may have a role where the issue is reported to that office or the Ombudsman decides to initiate an investigation into the raised matter. The agency may consider informing the Office of the Auditor General where matters concerning assets and finances are identified.

# Key resources

* PSM Act, Part 5
* [Discipline Standard](https://www.wa.gov.au/government/publications/discipline-standard)
* [A guide to the disciplinary provisions contained in Part 5 of the PSM Act](https://www.wa.gov.au/government/publications/guide-the-disciplinary-provisions-contained-part-5-of-the-psm-act)
* [Disciplinary investigations under Part 5 of the PSM Act – A guide for agencies](https://www.wa.gov.au/government/publications/disciplinary-investigations-under-part-5-of-the-psm-act-guide-agencies)
* [CCM Act](file:///C%3A%5CUsers%5CJPPartridge%5CDesktop%5COld%20Desktop%5CDownloads%5CWord%20re-brand%5Cintegrity%20and%20risk%5C%E2%80%A2%09https%3A%5Cwww.legislation.wa.gov.au%5Clegislation%5Cstatutes.nsf%5Claw_a6503.html)
* [Commissioner’s Instructions No.3 – Discipline – general](https://www.wa.gov.au/government/publications/commissioners-instruction-no-3-discipline-general)
* [Commissioner’s Instructions No.4 – Discipline – former employees](https://www.wa.gov.au/government/publications/commissioners-instruction-no-4-discipline-former-employees)
* [Commissioner's Instruction 40: Ethical Foundations](https://www.wa.gov.au/government/publications/commissioners-instruction-40-ethical-foundations)

Employee wellbeing

Employing authorities have a duty of care towards their employees as per s. 19 (1) of the [*Occupational Safety and Health Act 1984*](https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_a555.html)(OSH Act) to provide a workplace free of hazards. The definition of hazard is sufficiently broad to include anything that may

cause harm to an employee, including high levels of workplace-related stress. Where an employee is experiencing personal difficulties, their tolerance to workplace stress may be reduced and employers need to be mindful that these employees may be more susceptible to health issues including their mental wellbeing.

It should be noted that employees also have a responsibility to ensure their own safety and health in the workplace as per s. 20 (1) of the OSH Act.

While employers recognise that from time to time employees will have personal issues that impact negatively on their workplace behaviour and performance (e.g. lifestyle habits, financial pressures, family breakdowns, substance abuse or medical problems), employees have a responsibility to manage their own wellbeing.

Employers should be aware that formal grievance resolution processes, substandard performance and discipline investigations can be taxing on an employee’s wellbeing.

As such, appropriate support mechanisms should be put into place. Employers should note that even in the case of suspension in a disciplinary matter, their duty of care to the employee still stands. In instances where management is actively working to assist an employee through a difficult time, employees should be regularly reminded of the support mechanisms available to them, such as an ‘Employee assistance program’ (EAP).

Discretion may be needed where there may be a medical condition or health-related explanation for poor performance or inappropriate behaviour. It may be appropriate to suspend any process underway to address performance or behavioural concerns until an employee’s health status can be determined. The employee can be requested to obtain a medical report by a certified health practitioner nominated by the employer at the employer’s cost (under cl. 26 (4) of the Public Service Award 1992) if it is reasonably considered that the employee presents a danger to themselves or other staff while performing their workplace duties.

# Employee assistance programs

An EAP is a work-based intervention aimed at the early identification and resolution of work and personal problems that may adversely affect work performance. Offering support to an employee through an EAP may assist in reducing distress and related health issues during a workplace process. Problems do not need to be work related and may include health, family, financial, substance abuse or emotional concerns. EAP programs may include

the provision of advice to managers in their human resources-related role and include mediation services to assist in resolving workplace conflicts.

# Retirement on the grounds of ill health

Section 39 of the PSM Act provides for the retirement of public service officers on the grounds of ill health at the employer’s request. [Guidelines](https://www.wa.gov.au/government/publications/guidelines-retirement-the-grounds-of-ill-health-0) are provided on the www.wa.gov.au website. However, where an employee is under duress due to a process concerning their behaviour, employers should take steps to ensure workplace stress is minimised. Citing health reasons related to stress caused by one of these processes to justify an employee’s retirement on the grounds of ill health is not appropriate.

# Recordkeeping

It is important to keep records of any processes undertaken. The nature of records kept will be dictated by the nature and seriousness of the issue and the process implemented or method of resolution adopted. For example, an informal grievance resolution process regarding a minor interpersonal matter may only require a diary entry, whereas a formal process that required investigation may require a separate file and written memos or records of events.

As required by the [State Records Act General Disposal Authority for State Government Information](http://www.sro.wa.gov.au/state-recordkeeping/disposal-state-records/general-disposal-authorities) (RD 2013017) managers need to maintain records in the specified way.

## Grievances including discrimination or harassment

Documents should be kept for two years for informal and seven years for formal grievances. Documentation of unsubstantiated grievances should not be placed on either of the parties’ personal files.

## Substandard performance management matters

Documents and reports where formal action is taken is to be kept for 75 years after employee’s date of birth or seven years after retirement, whichever is later, or seven years after death. Where no formal action is taken in respect to substandard performance documents should be kept for 5 years after action completed.

## Discipline related matters

Documents and records of investigations or where action is taken in respect to breaches of discipline and where the documents are held as part of personal file should be kept for 75 years after employee’s date of birth or seven years after retirement, whichever is later, or seven years after death. Where documents are held on a separate, file they should be kept for seven years after action completed.

Further assistance

Contact our Workforce Practice team via agencysupport@psc.wa.gov.au if you are seeking advice on:

* Recruitment and employment
* Redeployment and redundancy
* Organisational change
* Workforce related Commissioner’s Instructions or Circulars
* The framework and operation of the Public Sector Standards in Human Resource Management.

Call our Integrity Advisory line on (08) 6552 8888 if you are seeking advice or further information on:

* Reporting or notifying minor misconduct
* Codes of ethics or codes of conduct
* The Public Interest Disclosure process
* Commissioner’s Instructions and Circulars relating to integrity and ethical conduct and discipline
* Integrity promotion and misconduct programs and products.

If you need legal advice on behalf of your agency, the [State Solicitor’s Office](https://department.justice.wa.gov.au/s/state_solicitors_office.aspx) is the appropriate point of contact. You can contact them on (08) 9264 1888.

Appendix: Workplace behaviour and issue assessment – Selecting the appropriate process

