

Misconduct and Unsatisfactory Performance Policy and Procedures



New South Wales
Crime Commission

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POLICY

1. Objective

The NSW Crime Commission (the Commission) requires its employees to demonstrate the highest levels of ethics, integrity and professionalism, and to perform their duties to the highest standard.

This document provides Commission employees with the distinction between misconduct and unsatisfactory performance, and outlines the procedures to be implemented and actions available for a finding of misconduct or unsatisfactory performance.

2. Scope/Application

This policy applies to all Commission employees, who are employed under the auspices of the *Government Sector Employment Act 2013* (the GSE Act).

3. Definitions

Actions for a finding of misconduct	In accordance with s 69(4) of the GSE Act, actions taken for a finding of misconduct can include: <ul style="list-style-type: none">• termination of employment without giving the employee the opportunity to resign;• termination of employment after first giving the employee the opportunity to resign;• the imposition of a fine on the employee;• reducing the remuneration payable to the employee;• reducing the classification or grade of the employee;• assigning the employee to a different role; or• cautioning or reprimanding the employee.
Misconduct	Misconduct involves unacceptable or improper conduct which is outside the law, policy or directions. Misconduct may include, but is not limited to, conduct that: <ul style="list-style-type: none">• contravenes the GSE Act;• amounts to reprisals against another Commission employee;• is improper, disgraceful or unbecoming;• adversely affects the Commission's reputation;• shows unfitness to continue as an employee of the Commission;• is in contravention of the standard of conduct imposed by the Commission's <i>Code of Conduct</i>; and/or• is in breach of the Commission's policies, some of which underpin the Commission's <i>Code of Conduct</i>. <p>The <i>Law Enforcement Conduct Commission Act 2016</i> (the LECC Act) Section 9(3) defines Misconduct of Crime Commission officers as follows:</p> <p>1 Definition</p> <p>For the purposes of the LECC Act, <i>misconduct</i> of a Crime Commission officer means any misconduct (by way of action or inaction or alleged</p>

	<p>action or inaction) of a Crime Commission officer:</p> <ul style="list-style-type: none"> (a) whether or not it also involves participants who are not Crime Commission officers, and (b) whether or not it occurs while the Crime Commission officer is officially on duty, and (c) whether or not it occurred before the commencement of this subsection, and (d) whether or not it occurred outside the State or outside Australia. <p>2 Examples</p> <p>Misconduct of a Crime Commission officer can involve (but is not limited to) any of the following:</p> <ul style="list-style-type: none"> (a) conduct of the officer or employee that constitutes a criminal offence, (b) conduct of the officer or employee that constitutes corrupt conduct, (c) conduct of the officer or employee that constitutes unlawful conduct (not being a criminal offence or corrupt conduct), (d) conduct of the officer or employee that constitutes a disciplinary infringement. <p>3 Former Crime Commission officers</p> <p>Conduct may be dealt with, or continue to be dealt with, under this Act even though any Crime Commission officer involved has ceased to be a Crime Commission officer. Accordingly, references in this Act to a Crime Commission officer extend, where appropriate, to include a former Crime Commission officer.</p>
Corrupt conduct	<p>Section 8 and 9 of the ICAC Act provides the following:</p> <p>8 General nature of corrupt conduct</p> <ul style="list-style-type: none"> (1) Corrupt conduct is: <ul style="list-style-type: none"> (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or (d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person. (2) Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions

	<p>by any public official, any group or body of public officials or any public authority and which could involve any of the following matters:</p> <ul style="list-style-type: none"> (a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition), (b) bribery, (c) blackmail, (d) obtaining or offering secret commissions, (e) fraud, (f) theft, (g) perverting the course of justice, (h) embezzlement, (i) election bribery, (j) election funding offences, (k) election fraud, (l) treating, (m) tax evasion, (n) revenue evasion, (o) currency violations, (p) illegal drug dealings, (q) illegal gambling, (r) obtaining financial benefit by vice engaged in by others, (s) bankruptcy and company violations, (t) harbouring criminals, (u) forgery, (v) treason or other offences against the Sovereign, (w) homicide or violence, (x) matters of the same or a similar nature to any listed above, (y) any conspiracy or attempt in relation to any of the above. <p>(2A) Corrupt conduct is also any conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve any of the following matters:</p> <ul style="list-style-type: none"> (a) collusive tendering, (b) fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety or the environment or designed to facilitate the management and commercial exploitation of resources, (c) dishonestly obtaining or assisting in obtaining, or dishonestly benefiting from, the payment or application of public funds for
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private advantage or the disposition of public assets for private advantage,

- (d) defrauding the public revenue,
- (e) fraudulently obtaining or retaining employment or appointment as a public official.

9 Limitation on nature of corrupt conduct

(1) Despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve:

- (a) a criminal offence, or
- (b) a disciplinary offence, or
- (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or
- (d) in the case of conduct of a Minister of the Crown or a member of a House of Parliament – a substantial breach of an applicable code of conduct.

(2) It does not matter that proceedings or action for such an offence can no longer be brought or continued, or that action for such dismissal, dispensing or other termination can no longer be taken.

(3) For the purpose of this section:

“applicable code of conduct” means, in relation to:

- (a) a Minister of the Crown – a ministerial code of conduct prescribed or adopted for the purposes of this section by the regulations, or
- (b) a member of the Legislative Council or of the Legislative Assembly (including a Minister of the Crown) —a code of conduct adopted for the purposes of this section by resolution of the House concerned.

“criminal offence” means a criminal offence under the law of the State or under any other law relevant to the conduct in question.

“disciplinary offence” includes any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law.

(4) Subject to subsection (5), conduct of a Minister of the Crown or a member of a House of Parliament which falls within the description of corrupt conduct in section 8 is not excluded by this section if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.

(5) Without otherwise limiting the matters that it can under section 74A (1) include in a report under section 74, the Commission is not authorised to include a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in subsection (4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct constitutes a breach of a law (apart from this Act) and the Commission identifies that law in the report.

(6) A reference to a disciplinary offence in this section and sections 74A and 74B includes a reference to a substantial breach of an applicable requirement of a code of conduct required to be complied with under section 440 (5) of the *Local Government Act 1993*, but does not include

	a reference to any other breach of such a requirement.
Procedural fairness	<p>Procedural fairness is a legal safeguard applying to an individual whose rights may be affected. It serves an important function in the investigation of complaints by:</p> <ul style="list-style-type: none"> • providing a means of checking facts and identifying issues; • exposing weaknesses in the investigation; • informing the basis and direction of the investigation. <p>A fundamental rule of procedural fairness is that a person must be advised of the allegations against them and have an opportunity to respond to those allegations. Procedural fairness also encompasses matters such as:</p> <ul style="list-style-type: none"> • making reasonable inquiries or investigations prior to making a decision; and • ensuring that the decision maker has no direct interest and is unbiased in the matter.
Actions for a finding of unsatisfactory performance	<p>In accordance with s 68 of the GSE Act, the options that are available for a finding of unsatisfactory performance include:</p> <ul style="list-style-type: none"> • terminating the employment (after giving the employee an opportunity to resign); • reducing the remuneration payable to the employee; • reducing the classification or grade of the employee; • assigning the employee to a different role.
Serious offence	An offence that is punishable by imprisonment for 12 months or more.
Unsatisfactory performance	<p>Unsatisfactory (or poor) performance differs from misconduct.</p> <p>Unsatisfactory performance can include:</p> <ul style="list-style-type: none"> • work that is unsatisfactory in terms of quantity, quality or timeliness; • work that does not meet the expectations or standards required of the employee's <i>Performance Management Plan</i>; • breaches of workplace practices or procedures, or not following a manager's reasonable direction; • breaches of policies and codes of conduct that do not warrant a misconduct investigation; • inappropriate behaviour, including poor communication or interaction with colleagues or stakeholders; • a series of minor issues that, combined, create a difficult work environment.

4. Policy Statements and Legislation

The Commission will provide an effective mechanism for dealing with misconduct and unsatisfactory performance in accordance with the GSE Rules.

The Commission will treat each potential misconduct or unsatisfactory performance matter objectively, confidentially, expeditiously, and in accordance with the principles of natural justice and procedural fairness.

While the Commission retains overall responsibility for the investigation of misconduct matters involving Commission personnel, the Commission recognises the legislated role of the LECC in providing an oversight function of such matters in accordance with the requirements of the *Law Enforcement Conduct Commission Act 2016* and the *Crime Commission Act 2012* (CC Act).

The Commission will report misconduct matters and notifiable misconduct matters in accordance with the requirements of the LECC Act and CC Act (as set out in the Commission's *Complaints Handling Policy and Procedures*).

4.1 Responsibilities

4.1 Commissioner

As the head of the NSW Crime Commission Staff Agency, the Commissioner is responsible for assessing reports of misconduct, making findings regarding allegations of misconduct and taking appropriate action. The Commissioner may also take action in respect of unsatisfactory performance.

In accordance with section 33 of the LECC Act, the Commissioner is required to report to the LECC all matters which the Commissioner suspects on reasonable grounds concerns or may concern officer misconduct or serious maladministration.

The Commissioner may request the Assistant Commissioner (Legal), the Chief Operating Officer, the People & Culture Manager or any other senior officer to assist with inquiries, except in situations where it may be inappropriate to do so (e.g. the officer being investigated has sought support from the Chief Operating Officer or People & Culture Manager).

4.2 Chief Operating Officer and People & Culture Manager

The Chief Operating Officer and the People & Culture Manager may provide assistance to the Commissioner in:

- the provision of procedural and policy advice;
- co-ordinating the investigation of allegations of misconduct or unsatisfactory performance;
- undertaking the investigation of allegations of misconduct or unsatisfactory performance;
- developing strategies for dealing with the findings of such an investigation; and
- the preparation of reports.

An employee who is the subject of an allegation of misconduct may seek support and advice from the Chief Operating Officer or People & Culture Manager except in situations where either or both the Chief Operating Officer or People & Culture Manager are involved in the investigation.

In situations where unsatisfactory performance continues following feedback and opportunities for the employee to make required improvements, the People & Culture Manager may be called upon to commence the process for managing unsatisfactory performance.

4.3 Assistant Commissioner (Legal) and Executive Directors

An employee who has observed possible misconduct by another employee may consult with their Executive Director or Assistant Commissioner (Legal) as a first point of contact. If the Executive Director or Assistant Commissioner (Legal) suspect on reasonable grounds that a

matter disclosed to them involves misconduct, they must report it, or have the alleged report it, verbally or in writing, to the Commissioner.

A Manager/Supervisor who believes an employee's performance may be unsatisfactory may consult with a Director or Executive Director to determine whether the Manager/Supervisor's concerns have foundation and to discuss possible actions.

4.4 Managers/Supervisors

4.4.1 Unsatisfactory performance

In accordance with the provisions of the Commission's *Performance Management System Framework*, managers/supervisors are expected to have regular constructive feedback exchanges with their employees and ensure that employees have a current, written *Performance Management Plan*.

A Manager/Supervisor is required to continuously monitor the performance of an employee against agreed capabilities and work standards and against the Commission's *Code of Conduct*.

If a Manager/Supervisor believes an employee's work is unsatisfactory, he or she is required to follow the procedures for identifying and managing unsatisfactory performance, contained within this document. It is likely that a Performance Improvement Plan may be required if performance issues persist.

4.4.2 Misconduct

If a Manager/Supervisor suspects on reasonable grounds that an employee's actions amount to misconduct, the Manager/Supervisor must report the matter directly to their Executive Director or Chief operating Officer, the Assistant Commissioner (Legal) or Commissioner.

In accordance with clause 9 of the *Government Sector Employment Regulation 2014* (the GSE Reg), an employee's Manager/Supervisor, having reason to believe the employee has been charged with or convicted of an offence, must immediately inform the Commissioner, in writing, of that fact.

4.5 Employees

In accordance with clause 9 of the GSE Reg, an employee who is charged with, or convicted of, a serious offence must immediately report that fact in writing to the Commissioner.

An employee who suspects on reasonable grounds that another employee has engaged in misconduct must report the matter directly to an Executive Director or the Chief Operating Officer, Assistant Commissioner (Legal), or the Commissioner.

A failure to report misconduct may in itself constitute misconduct.

5. Related Documents and Legislations

In relation to this policy, the following sections of the GSE Act apply:

- Section 47: termination of employment, including for:
 - a finding of misconduct;
 - unsatisfactory performance;
 - refusal to perform duties assigned to the employee; and
 - where an employee has been convicted of a serious offence.
- Section 68: actions the Commission may take in respect of a finding of unsatisfactory performance;

- Section 69: misconduct – Public Service and other prescribe government sector employees;
- Section 70: suspension of employees from duty pending a decision in relation to misconduct, criminal charge or corrupt conduct.

The *Government Sector Employment Rules 2014* (the GSE Rules) prescribe actions to be taken in respect of dealing with allegations of misconduct (Rules 38, 39, 40 and 41) and with unsatisfactory performance (Rule 36).

Other Acts that apply to this policy include the LECC Act and the CC Act. The Commission also has a number of related policies that may deal with aspects of potential employee misconduct or unsatisfactory employee performance. These include:

- Workplace Grievance Handling Policy and Procedures;
- Bullying and Unreasonable Behaviour Policy and Procedures;
- Internal Reporting Policy and Procedures;
- Complaints Handling Policy and Procedures; and
- The NSW Crime Commission Code of Conduct.

PROCEDURES

1. Misconduct

1.1 Assessing allegations of misconduct

Any Commission employee who suspects on reasonable grounds that another employee has engaged in misconduct must report it to the People & Culture Manager, an Executive Director or Chief Operating Officer, Assistant Commissioner (Legal) or the Commissioner. An Executive Director/Chief Operating Officer or the Assistant Commissioner (Legal) must treat the matter as a relevant complaint as per the *Complaints Handling Policy and Procedures* if s/he suspects on reasonable grounds that a matter reported to them concerns or may concern misconduct. The relevant information may be made verbally or in writing. This may include reporting the matter to LECC.

If a matter involves an allegation of misconduct on the part of a Commission officer, and also involves an allegation of corrupt conduct on the part of a person from another public authority, other than the NSW Police Force, and the Commissioner suspects on reasonable grounds that the matter involves corrupt conduct, s/he must report the matter to the Independent Commission Against Corruption (the ICAC).

If the Commissioner reports a matter to the LECC and/or the ICAC, s/he is must still proceed to deal with the matter within this Commission unless an agreement is reached with the LECC and/or the ICAC that the Commissioner withhold from doing so. Matters that the LECC has specifically agreed with the Commission not to investigate are included in the guidelines issued under s 14 of the LECC Act (refer Appendix A).

After an initial assessment of the allegation reported to the Commissioner, s/he may decide not to proceed with the matter if s/he is satisfied that:

- the allegation is vexatious or trivial;
- the incident or conduct does not amount to misconduct; or
- it would be difficult to establish the facts of the matter.

If, after an initial assessment, the Commissioner decides to proceed with the matter, the employee to whom the allegation refers is to be advised, in person and in writing:

- of the details of the allegation of misconduct; and
- of the action that may be taken against the employee under section 69(4) of the GSE Act.

The employee will be given a reasonable opportunity to make a written statement in response to the allegation and the Commissioner may, as a result of such a statement:

- decide to proceed with the matter; or
- decide not to proceed with the matter.

The employee is to be notified of the Commissioner's decision, and the person who made the allegation of misconduct is to be informed if the Commissioner decides not to proceed with the matter.

1.2 Making inquiries

The Commissioner may conduct such inquiries as s/he thinks appropriate for the purpose of determining whether the misconduct has occurred, and may request the assistance of the Assistant Commissioner (Legal), Chief Operating Officer, People & Culture Manager or other senior officer to undertake such inquiries on the Commissioner's behalf.

In accordance with Rule 39 of the GSE Rules, there is no provision for holding a formal hearing involving legal representation of the employee or any other person or the calling and cross-examination of witnesses.

The Assistant Commissioner (legal), Chief Operating Officer, People & Culture Manager or other senior officer whom the Commissioner has requested to assist in making inquiries should report to the Commissioner on the conclusion of his/her inquiries outlining all relevant available evidence and make a recommendation, based upon the evidence as disclosed, on whether the allegations have been proven on the balance of probabilities and what actions should be taken as prescribed by this policy and by instruments under the GSE Act.

1.3 Suspension of duty pending decision

If the Commissioner is dealing with an allegation of misconduct or a Commission employee is charged with a serious offence, the Commissioner may suspend the employee from duty until the allegation of misconduct or the criminal charge has been dealt with and any subsequent action has been taken.

The Commissioner may direct that any remuneration payable to the employee be withheld while the employee is suspended, which may be forfeited to the State if action is taken against the employee:

- for misconduct;
- for a corrupt conduct finding; or
- if the employee is convicted of the offence concerned.

The Commissioner may at any time lift such a suspension.

1.4 Commissioner's findings

In dealing with an allegation of misconduct internally, the Commissioner may:

- make a finding of misconduct, in which case the employee is to be notified in writing; or
- make a finding that misconduct has not occurred, in which case the Commissioner is to dismiss the allegation and advise the employee in writing.

In order to take any action under section 69(4) of the GSE Act, the Commissioner must first:

- notify the employee of the proposed action to be taken;

- give the employee a reasonable opportunity to make submissions in relation to the proposed action; and
- consider any such submissions made by the employee.

Having made a finding of misconduct, the Commissioner has the option of requiring the employee's conduct to be monitored over a specified period of time, as notified to the employee, instead of taking action under s 69(4) of the GSE Act.

If the Commissioner finds that the employee has again engaged in misconduct similar to the misconduct that was the subject of the previous finding, the Commissioner may take any action under s 69(4) of the GSE Act. In this situation, the employee is not to be given an opportunity to make submissions in relation to the proposed action.

1.5 Law Enforcement Conduct Commission

Any person may make a complaint to the LECC involving the possible misconduct of a Commission officer and the LECC may choose to investigate the complaint.

The Commissioner has a duty to report to the LECC any matter that the Commissioner suspects, on reasonable grounds, concerns or may concern officer misconduct.

Copies of such letters and any return correspondence shall be maintained by the Commissioner's Executive Assistant.

1.6 Record keeping

A written record of the proceedings and action taken in respect of any allegation of misconduct by a Commission employee must be kept. The Assistant Commissioner (Legal), Chief Operating Officer, People & Culture Manager or any other senior officer who has been requested to assist with any aspect of the investigation of misconduct may assist the Commissioner to prepare such a record.

The employee's personnel file is to include information about any finding of misconduct that is, in the Commissioner's opinion, in the public interest to be included. In forming that opinion, the Commissioner must consider the nature and seriousness of the misconduct and the need to minimise any unnecessary or prejudicial information being kept on the employee's personnel file.

Any allegation of misconduct that is discussed with the Assistant Commissioner (Legal) or an Executive Director/Chief Operating Officer and found to have no merit must be recorded in writing, including the details of the allegation and the reasons it was found to not have merit. This written record is to be maintained by the Executive Assistant to the Commissioner.

1.7 Disciplinary action

Having made a finding of misconduct by an employee, or if an employee is found to have been convicted of a serious offence, the Commissioner may take any of the following actions:

- 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.

The employee is to be notified in writing and his or her personnel file is to include a report on the finding of misconduct if the Commissioner believes it is in the public interest to be included.

2. Unsatisfactory Performance

2.1 Identifying unsatisfactory performance

The Commission's Performance Management System Framework¹ provides a structured approach to performance management, requiring regular reviews of performance and evaluation of employee achievement against agreed *Performance objectives* which are linked to the employee's role description. At the end of the Performance Management Plan cycle the Manager/Supervisor is required to complete a *Performance Evaluation Form* and nominate a performance classification from the following:

Below expectations – the employee has not successfully met all of the performance objectives of their PMP.

Expectations met – the employee has successfully met all of the performance objectives of their PMP or the employee's inability to meet one or more objectives was due to factors outside of the employee's control.

Expectations exceeded – the employee has successfully met all of the performance objectives of their PMP and has exceeded expectations.

If the employee's performance classification is rated as 'below expectations', the employee is given up to three months from this date to successfully meet the required performance objectives. A further Performance evaluation form is to be provided at such time as these have been met. If the objectives have not been met within three months, a *Performance Improvement Plan* may be implemented.

In order to achieve an effective workforce and reduce the risk of unsatisfactory employee performance, regular employee engagement and feedback is essential. To assess whether an employee is performing satisfactorily or otherwise, the Manager/Supervisor must have available the employee's role description and current *Performance Management Plan*.

The Manager/Supervisor needs to make a determination about the employee's performance:

- whether the employee is performing to their optimum ability but this fails to achieve the Commission's required standard; or
- whether the employee is capable of performing to the pre-established standards for the role, but is not doing so.

Any deficiencies in employee work performance should be addressed as soon as they become evident, as part of a regular feedback exchange. This avoids, where possible, the need for formal action on the management of performance issues.

2.2 Performance improvement

2.2.1 Stage one – early intervention

If the Manager/Supervisor identifies a performance issue, and if this has not been resolved by the regular feedback process, the Manager/Supervisor is required to make an assessment about whether the unsatisfactory performance is due to:

- a poor attitude and, if so, the reasons behind it; or
-

- external factors, such as personal issues.

If possible the Manager/Supervisor should attempt to address or, at minimum, acknowledge any underlying cause and consider such factors when providing clear advice to the employee that his or her performance is unsatisfactory. The employee should be given an opportunity to resolve their performance issues within an agreed timeframe.

The Manager/Supervisor may consult with a Director or Executive Director about the employee's performance and potential strategies for achieving improvements.

2.2.2 Stage two – Performance Improvement Plan

If an employee has been given an opportunity to resolve his or her performance issues and the performance issues continue, the Manager/Supervisor is required to notify the People & Culture Manager.

The Manager/Supervisor, in consultation with the People & Culture Manager, having regard to the employee's role description and Performance Management Plan, may develop a Performance Improvement Plan with the goal of helping the employee to achieve the required standards. Possible solutions to address performance issues can include:

- coaching;
- training to improve the employee's skills;
- counselling;
- making arrangements to help manage an external issue that is impacting on the employee's work;
- giving consideration to changing some of the employee's responsibilities;
- reassigning the employee to a different work group if interactions with one or more colleagues are at issue.

With a *Performance Improvement Plan* and timeframes established, the Manager/Supervisor is required to monitor the employee's performance to ascertain whether the required standards have been met and whether additional actions or strategies may need to be implemented. By providing the employee with regular feedback during this period, both Manager/Supervisor and the employee have a shared understanding of how the employee is or is not progressing.

A formal review will be conducted by the Manager/Supervisor and the People & Culture Manager at the conclusion of the pre-determined time period, which would usually be no longer than six months. If the employee's performance is satisfactory, no further action is required and the regular feedback exchange resumes.

On-going and unresolvable unsatisfactory performance must be reported to the Commissioner for assessment and possible formal management action.

2.2.3 Stage three - formal management of unsatisfactory performance

Following failed attempts to resolve performance issues, formal management of unsatisfactory performance is led by the Commissioner. The Commissioner may request the People & Culture Manager, Chief Operating Officer or any other senior officer to manage an investigation, make recommendations and/or prepare reports on the Commissioner's behalf.

The Commissioner may take action under section 68(2) of the GSE Act if:

- the employee has been subject of a performance improvement program, and has failed to achieve the minimum standards required after being given a reasonable opportunity to do so;
- the employee's performance is determined, by the Commissioner, to be unsatisfactory;

- reasonable steps have been taken to advise the employee that his or her performance is unsatisfactory and the basis on which it is unsatisfactory;
- the employee is notified that the Commissioner is proposing to take specified action under section 68(2) of the GSE Act;
- the employee is given a reasonable opportunity to respond to the notice; and
- the Commissioner has taken into consideration any such response.

Such action may include:

- terminating the employment of the employee, after giving the employee an opportunity to resign;
- reducing the remuneration payable to the employee;
- reducing the classification or grade of the employee; or
- assigning the employee to a different role.

2.3 Record keeping

A written record of action taken to address instances of unsatisfactory performance must be maintained and copies retained on the employee's personnel file. The Manager/Supervisor is required to keep records of any interviews in which the matter of the employee's unsatisfactory performance is discussed, including:

- the date and location of each meeting;
- the advice the employee received about their unsatisfactory performance;
- what opportunities the employee was given, to develop and meet expectations;
- what feedback was given, following monitoring.

Should formal management of unsatisfactory performance be required, records shall be prepared and maintained by the People & Culture Manager or Chief Operating Officer, on behalf of the Commissioner.

Version Control

Version	Effective date	Update comments	Author
1.0	30 June 2012	Original.	Governance Team
1.01	16 September 2013	Insertion of version control and publication information. Typographical corrections. Pagination corrections.	Governance Team
2.0	12 February 2015	Significant re-write in light of the GSE Act and GSE Rules.	Governance Team
2.1	2 October 2015	Amendments to reflect Commission's new Performance Management System Framework. (16Oct15 updated hyperlink to Code of Conduct.)	Governance Team
2.2	9 May 2016	Amendments to remove statements about discipline and remedial action except as defined by the PIC Act and the Crime Commission Act.	Governance Team

2.3	16 August 2016	Amended titles	Governance Team
2.4	21 January 2019	Amended to reflect changes of the PIC to the LECC and removal of the Inspector of the Crime Commission and the revision of the Complaints Handling Policy and Procedure	People & Culture Manager
2.5	23 March 2022	Include reference to Online Abuse in the Commission's Bullying, Online Abuse, Harassment and Discrimination Policy and Procedures. Amended role titles.	People & Culture Manager

Publication Information

Title	Misconduct and Unsatisfactory Performance Policy and Procedures
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Review date	1 March 2027
Supersedes	Version 2.4
Classification	Unclassified
Acknowledgements	Public Service Commission, Employment Portal, <i>Resolve Unsatisfactory Performance</i> .

Annexure “A”

**Guidelines between the
Law Enforcement Conduct Commission
and
the New South Wales Crime Commission
Pursuant to s14 of the
*Law Enforcement Conduct Commission Act 2016***

1. Guidelines

Notifiable misconduct matters

Pursuant to s14(1)(b) of the LECC Act, the following are the kinds of misconduct matters required to be notified to the LECC ('*notifiable misconduct matters*') by the NSWCC:

- a) criminal conduct,
- b) corrupt conduct²,
- c) detrimental action or reprisal (including any possible payback complaint) against a Crime Commission officer or other person making a protected disclosure or allegation about an officer,
- d) allegations of improper association,
- e) unauthorised release of Crime Commission information or improper disclosure of information,
- f) any allegations of unreasonable use of the Crime Commission's powers under the *Crime Commission Act 2012*,
- g) any failure to comply with policies and procedures in regards to declarable associations, conflicts of interest or secondary employment,
- h) any significant failure to comply with policies and procedures,
- i) conduct which is or might be serious maladministration by an officer or the NSWCC,
- j) Letters of demand, Statements of Claim, originating process or other pleadings or particulars where the State of New South Wales, Crime Commissioner, or a Crime Commission officer is named as a defendant or proposed defendant within the body of the document, and that alleges, expressly or impliedly, an act or omission capable of constituting serious misconduct on the part of any Crime Commission officer.

The circumstances and the facts surrounding a notifiable matter will determine whether the matter will be investigated or oversighted by the LECC or referred back to the NSWCC for appropriate action.

Matters which the LECC will not investigate or oversight

Pursuant to s14(1)(a) and (d) of the LECC Act, the LECC and the NSWCC may enter in to Agreements concerning NSWCC matters that the LECC will not investigate or oversight.

² As defined in s 7 of the *Independent Commission Against Corruption Act 1988*

UNCLASSIFIED

To that end, the LECC will not investigate or oversight matters that involve conduct or behaviour that is inconsistent with or prohibited by the terms of an officer's employment, including the Crime Commissioner's instructions or constitutes a breach of discipline or unworthy conduct that might reasonably be regarded as embarrassing the reputation of the NSWCC but which does not involve serious dishonesty or serious incompetence. Such conduct or behaviour includes but is not limited to:

- (a) allegations that a Crime Commission officer was not ill while claiming sick leave,
- (b) allegations of minor misuse of NSWCC assets,
- (c) traffic offences, unless the offence raises other notifiable issues concerning a lack of integrity,
- (d) allegations of minor misuse of email, such as forwarding emails with non-work related content and documents that take advantage of a Crime Commission officer's membership of the NSWCC but does not otherwise amount to misconduct,
- (e) complaints about Crime Commission officer incompetence that are otherwise not notifiable,
- (f) performance management matters that have not resulted in a notifiable misconduct matter, for example, lack of punctuality, unsatisfactory completion of a performance agreement or poor work output, or
- (g) any allegations of a trivial nature.

Although the matters described above are not *notifiable misconduct matters*, such complaints must be recorded by the NSWCC in the appropriate records management system and made available to the LECC on request.