

Tabled 29/8/24
Premier

Employment Direction No. 5

PROCEDURES FOR THE INVESTIGATION AND DETERMINATION OF WHETHER AN EMPLOYEE HAS BREACHED THE CODE OF CONDUCT

State Service Act 2000

EMPLOYMENT DIRECTION

Directive

Pursuant to Section 17 of the *State Service Act 2000*, I hereby direct that the arrangements and requirements set out in this Employment Direction are to apply, effective 29 August 2024.

Signed



Issued by authority of the Minister administering the *State Service Act 2000*.

Date: 28 August 2024

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1. Purpose

- 1.1 In accordance with section 10(3) of the *State Service Act 2000* (the Act), the Minister establishes in this Direction the procedures for the investigation and determination of whether an employee, senior executive, equivalent specialist, or prescribed officer (hereinafter referred to as an employee) has breached the State Service Code of Conduct (the Code).
- 1.2 A determination that an employee has breached the Code may only be made in accordance with these procedures.

2. Application

- 2.1 This Direction is to apply to State Service Agencies as per Schedule 1 of the Act.
- 2.2 These procedures do not apply to alleged breaches of the Code by Heads of Agencies.
- 2.3 A Head of Agency may delegate their function or power to be exercised in accordance with this Direction.
- 2.4 The Minister (or delegate) may impose a sanction on an employee who is found to have breached the Code (section 10 of the Act).

3. Definitions

- 3.1 Where words and phrases used in this Direction are defined in the *State Service Act 2000* the same meaning applies.
- 3.2 '**Code**' means Code of Conduct.
- 3.3 '**Code process**' means any process taken in accordance with this Direction to determine whether a breach of the Code of Conduct has occurred.
- 3.4 'Reportable conduct' means reportable conduct in accordance with section 7 of the *Child and Youth Safe Organisations Act 2023* (CYSOA)

4. Legislation/Award Basis and Related Documents

- 4.1 *State Service Act 2000*, sections 9, 10, 14, 15, 16, 17, 20, 21, 31, 34, 37 and 50.
- 4.2 *State Service Regulations 2021* (the Regulations), section 31(4).
- 4.3 Practice Procedure & Standard (PPS) No. 5 – *Register for Tasmanian State Service Code of Conduct Breaches resulting in or that would have resulted in termination*.
- 4.4 Supporting materials and guides approved for release by the Head of the State Service may assist agencies in dealing with alleged breaches of the Code but do not form part of this Direction.

5. Operative Date

- 5.1 This Direction will take effect from the date of issue and will remain in force until varied or revoked.
- 5.2 Any procedure commenced under the previous Employment Direction No. 5 is to continue and be finalised in accordance with this Direction so far as is possible, and with any modification which the Head of Agency considers to be necessary or appropriate in the particular circumstances and to ensure that procedural fairness is afforded to the employee.

6. General Provisions

- 6.1 Under section 9 of the Act, the Code establishes the conduct requirements for all employees. The Code complements the State Service Principles and any Agency specific standing orders made under section 34(2) of the Act.
- 6.2 The purpose of an investigation is to gather all relevant information to make findings of fact in relation to allegation(s) in order for a Head of Agency to determine whether or not there has been a breach of the Code.
- 6.3 A determination of whether there has been a breach of the Code is to be made on the civil standard of proof i.e., on the balance of probabilities¹.
- 6.4 Processes relating to alleged Code breaches are to be completed within a reasonable timeframe, appropriate in the circumstances.
- 6.5 Allegations subject to a Code process that may involve possible criminal conduct, should be reported to Tasmanian Police.

7. Safety and Protection of Children

- 7.1 The protection and safety of children is to be a primary consideration when managing allegations and determinations of breaches of the Code involving children.
- 7.2 An investigation under these procedures that relates to reportable conduct may be combined with, or constitute, an investigation under the CYSOA.
- 7.3 Where an investigation of an allegation of a breach of the Code is likely to require interviewing a child, the Head of Agency must ensure that the processes involving the child are sensitive and appropriate bearing in mind the age, maturity, and personal circumstances of the child.

¹ 1 A fact is proved on the 'balance of probabilities' if the decision maker is satisfied that its existence is more probable than not.

Before interviewing a child, consideration must be given to such issues as the permission of the parent or guardian, the child being accompanied by a parent, guardian, or support person and, where appropriate keeping the child informed of the progress of the investigation.

8. Code Processes

- 8.1 Should a Head of Agency have reasonable grounds to believe that a breach of the Code may have occurred, the Head of Agency may determine to commence a process in accordance with this Direction.
- 8.2 Where a Head of Agency decides to commence a Code process in accordance with clause 8.1, they must inform the employee suspected of a breach of the following in writing:
 - a. the specific behaviour or conduct the employee is alleged to have engaged in, in sufficient detail for the employee to know what is alleged against them;
 - b. the provision(s) of the Code alleged to have been breached;
 - c. that the employee may seek their own advice and can be assisted by a person of the employee's choice throughout the process;
 - d. of the possible sanctions that may be imposed in accordance with section 10 of the Act if the matter proceeds to a determination by the Head of Agency that the employee has breached the Code; and
 - e. whether an investigator (refer to Appendix 1) is to be appointed, and the name of the investigator.
- 8.3 Where a Head of Agency decides to appoint an investigator, the appointment is to be in writing. An investigator may be an employee or not. The investigator is to be impartial and report to the Head of Agency on the outcome of their factual investigation (Appendix 1).
- 8.4 A Head of Agency may decide to commence a Code process without an investigator if:
 - a. evidence capable of proving the alleged breach is already available (this may include facts and information provided by an external authority);
 - b. the employee has been convicted of a crime or an offence in Tasmania which is punishable by imprisonment for a term of 6 months or more or has been convicted elsewhere than in Tasmania of a crime or of an offence which, if committed in Tasmania, would be a crime or an offence so punishable; or
 - c. the employee has been found to have committed reportable conduct.

- 8.5 Before determining a matter without appointing an investigator, the employee must be given a reasonable opportunity to respond to any evidence that may be relied upon, and any response must be taken into account.
- 8.6 Where a Head of Agency has reported the alleged conduct to Tasmania Police, they should wherever possible continue with the process to determine whether a breach of the Code has occurred, subject to ongoing consultation with Tasmania Police with respect to the status of the matter.
- 8.8 If, during the course of a Code process in accordance with clause 8.1, the Head of Agency has reasonable grounds to believe that the employee may have committed further breaches of the Code, they may combine these allegations with the process on foot, deal with them as a separate process or decide to deal with them otherwise. If they intend to deal with them as breaches of the Code, they must inform the employee of those further allegations (in accordance with clause 8.2) and provide an opportunity for the employee to respond to them.
- 8.9 At any time during the processes in accordance with this Direction, the Head of Agency may decide to take no further action on the allegation(s) or to deal with it otherwise than as an alleged breach of the Code. In such a case the Agency must advise the employee in writing of this decision, including the reasons for the decision.
- 8.10 A Head of Agency may not commence a new Code process where a decision or action has been taken in accordance with clause 8.9 unless substantial and material new evidence becomes available that in the Head of Agency's view warrants a new Code process.
- 8.11 Before determining a matter where an investigator has been appointed, the employee must be provided with a copy of the Investigator's report(s) or a statement that describes the alleged breach(es) a summary of the evidence and provided with an opportunity to respond. The employee may choose to provide this response in writing or otherwise and may provide any other relevant evidence in any form. The Head of Agency must take any response into account before determining the matter.

9. Notification of Determination

- 9.1 If a determination is made that the employee has breached the Code, the Head of Agency must advise the employee in writing of the determination and the reasons for it.
- 9.2 The reasons for determination of the breach of the Code are to be in sufficient detail to enable the employee to ascertain the facts found and the basis for the determination.

10. Imposition of Sanction(s)

- 10.1 If a determination is made that the employee has breached the Code, the Minister (or their delegate) may impose one or more sanctions in accordance with section 10(1) of the Act.
- 10.2 Prior to any decision being made to impose any sanction, the employee is to be advised of any sanction(s) under consideration and the factors that are under consideration in determining the sanction(s); and provided with an opportunity to give a response; which is to be given consideration.

11. Review Rights

- 11.1 An employee has the right to seek review for any State Service Action, other than termination of employment, in accordance with s 50(1)(b) *State Service Act 2000*, and in accordance with timeframes for review as prescribed in the Regulations.
- 11.2 If the sanction imposed is termination of employment, any dispute will be dealt with by the Tasmanian Industrial Commission in accordance with the *Industrial Relations Act 1984*.

12 Sharing of Information

- 12.1 Agencies are to ensure any information provided to any parties in accordance with this Direction is compliant with the provisions of the *Personal Information Protection Act 2004*.

13. Requirement to keep records

- 13.1 The Head of Agency must keep a true and accurate record of all proceedings under this Direction, including:
- a. determinations where it was found that an employee had breached the Code, or a former employee would have been found to have breached the Code;
 - b. determinations where it was found that no breach of the Code had occurred;
 - c. discontinued Code matters and the reasons for discontinuation;
 - d. details of the appointment of any investigator;
 - e. any investigations conducted under this Direction;
 - f. all relevant hard copy, handwritten and electronic correspondence relating to the matter that informed the determination including a record of the employee's response; and

g. any sanction imposed in accordance with section 10 of the Act.

13.2 These records must be made available to the Head of the State Service as and when requested.

Note – The *Archives Act* and *Personal Information Protection Act* apply to the collection and storage of the above records.

14. Review

This Direction will be reviewed by 31 August 2025.

Appendix 1: Where an Investigator is appointed by a Head of Agency

1. Where a Head of Agency determines to appoint an Investigator, they are to be appointed in writing.
2. The Investigator is to be advised in writing of the scope of the investigation, the allegations, and the requirement for a written report.
3. During the course of the investigation, the employee alleged to have breached the Code is to be given the opportunity to be interviewed and, if they wish, to provide evidence in any form to the Investigator.
4. Before being asked to participate in the process it should be made clear to the employee that anything said may be used as evidence if the matter progresses to determination. The employee is to be given the option of having another person of the employee's choice present at any interview to support the employee through the process.
5. In line with trauma informed investigations and processes the provision of evidence in a specific form (e.g., requesting only written statements) is not mandated in this Direction. People being investigated or providing evidence should be asked how they are most comfortable providing it. Evidence and statements can be collected in a variety of ways including audio, video, by writing for a person a statement that they can endorse, and by accepting written statements where appropriate.
6. The Investigator's report(s) must:
 - a. provide evidence (if any), relevant to the circumstances relating to each alleged breach of the Code of which the employee was informed;
 - b. include as attachments all relevant submissions, statements, records of interview or other documentary material; and
 - c. only include those relevant matters.

