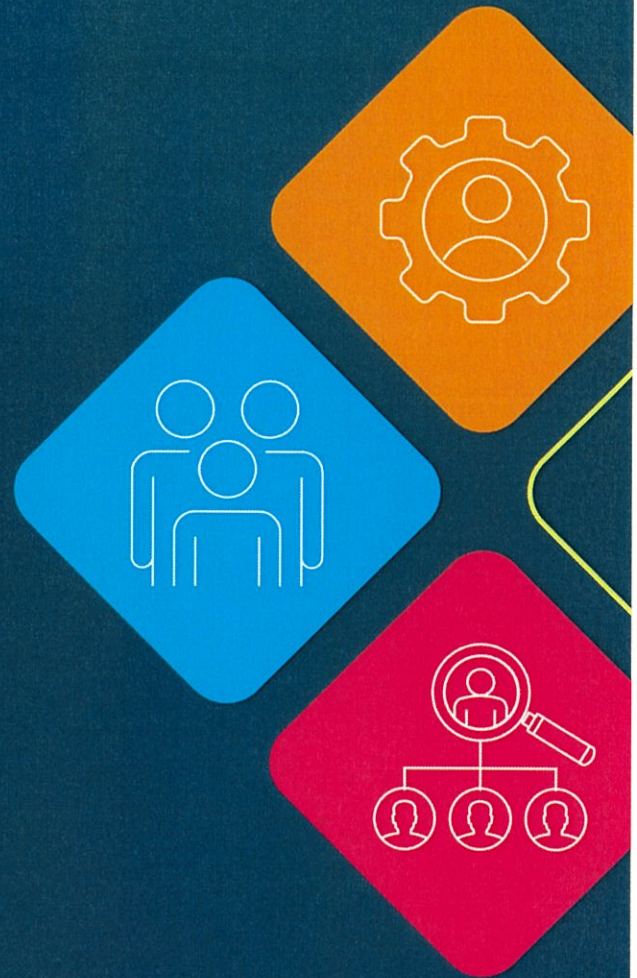




STATE SERVICE MANAGEMENT OFFICE



Revised Employment Direction No. 5

‘What’s Changed’

August 2024

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Background

Both the Tasmanian State Service Review and the Commission of Inquiry (Col) found that changes to ED5 and importantly, the way in which ED5 is applied in Agencies were required.

Key themes from these reports included that the processes should be more efficient, effective and timely and that the State Service needed to build capability across Agencies in how to manage ED5's including dealing with the most serious allegations to keep children safe.

Recommendation #8 of the Tasmanian Government's Keeping Children Safe Interim Response to the Col committed to reviewing and rewriting ED5.

This guidance material is intended to provide a summary of the changes that have been made to Employment Direction No. 5 '*Procedures for the Investigation and Determination of whether an employee has breached the Code of Conduct*' (ED5) as a first stage response to the Commission of Inquiry and is intended to assist all decision makers and those involved in managing ED processes to undertake code of conduct matters in an effective, efficient and timely manner.

This includes ensuring that there is flexibility to deal with individual matters, ensuring that the protection of children in these processes is a paramount consideration, the principles of procedural fairness apply, and sharing of information is applied wherever possible within the limits of the law.

The changes in the revised ED5 are a first step for change, and the review of the Employment Direction will continue to be considered with further changes anticipated.

ED5 ensures that a fair and consistent process is applied, when considering if an employee's behaviour and/or conduct may be a breach of the Code of Conduct.

Further supporting materials and guidance will be developed to support Agencies in the application of the ED5.



Key Changes

The purpose of this document is to outline the key changes to ED5 following the release of the new revised version.

1. Delegations

The ED5 itself provides the authority for the Head of Agency to delegate the functions and powers for the investigation and determination of whether the code of conduct has been breached.

Please note that the authority for delegating the imposition of a sanction other than termination is a ministerial function and power in accordance with s10(2) of the *State Service Act* for sanctions specified in s10(1)(a) – (f) and s44(4) of the *State Service Act* for termination.

Determination

Previously ED5 allowed for the delegation of the commencement of a code process, appointment of an investigator and all other functions and powers leading to a determination of a breach of the Code of Conduct (Head of Agency delegation) within the Department of Health and the Department of Education, Children and Young People (DECYP) only.

For all other Agencies there was no power for the Head of Agency (HoA) to delegate their functions and powers within the ED including the power to determine a breach of the Code of Conduct. The ED provided that the power could not be delegated and as such remained with the Head of Agency.

Clause 2.3 of ED5 now provides that a Head of Agency may delegate their functions or powers to be exercised in accordance with the Direction.

Sanction

It is noted that the imposition of a sanction following the determination of a breach of the Code of Conduct is a Ministerial (Premier) delegation in accordance with the *State Service Act 2000*. Currently, except for the Department of Health and DECYP, only Heads of Agencies are delegated the power to impose sanctions following a determination of a breach.

Heads of Agencies (through SSMO) may now request the delegation of the power to impose a sanction (other than termination) to a person other than the Head of Agency. Any delegation is usually requested at the office level rather than at an individual level.

It is noted that the power to impose the sanction of termination cannot be delegated to anyone other than a HoA.

What does this mean in practice?

Breach Delegate

This enables the HoA to delegate (to an appropriate office or position) the functions and powers in the ED5 (excluding sanction) to determine a breach including the decision to commence an ED5 process (on the basis of a reasonable belief that a breach may have occurred), appointing an investigator, or not, consideration of any further allegations, and a determination as to whether the Code has been breached or not (an office/position delegated this responsibility is to be referred to as the Breach Delegate)

Sanction Delegate

This enables the Minister (Premier) to delegate to other than a Head of Agency for imposing sanctions other than termination.

This means that a Breach delegate may also impose, under delegation from the Minister a sanction other than termination (a person delegated this responsibility is to be referred to as the Sanction Delegate). Noting that whilst it is possible for a Breach Delegate to recommend termination, they cannot impose the sanction of termination.

Depending on the circumstances a HoA may decide to have one delegate commence and determine the matter (the Breach delegate) and a different delegate (of the Minister) to impose a sanction, other than termination (the Sanction delegate).

Once a matter is being dealt with by a Breach delegate, if it is decided that an alternate Breach delegate is referred the matter for decision making, then this is to be formally authorised and appropriately communicated to the parties.

There are benefits to a more flexible approach, and this change provides for the management of particular cases, of different levels of risk and complexity by different delegates.

This does not include applying the sanction of termination to an employee as that can only be imposed by a HoA. This delegated power remains with the requirement that a HoA must consult with the Director, SSMO before exercising the power to terminate.

An Agency will be required to amend and issue/reissue relevant delegations to reflect any new delegations put in place in relation to the revised ED5.

Any requests to changes to the delegation to impose sanctions (Ministerial delegations) are to be made by the HoA through SSMO.

From here on, in this guidance, a reference to a HoA also refers to their delegate where a HoA delegates in accordance with the revised ED5.

2. Safety and Protection of Children

A new clause 7 has been included which means that the safety and protection of children is a paramount consideration in ED5 processes.



Clause 7.1 states that 'the protection and safety of children is to be a primary consideration when managing allegations and determinations of breaches of the Code involving children'.

This will ensure the ED5 process will be tailored as appropriate for the safety and protection and needs of children and ensuring witnesses only have to be reinterviewed where absolutely necessary.

Where there are allegations involving a child in relation to child sex abuse or related conduct, these matters are to be taken seriously and investigated.

Clauses relating to the interviewing of a child as part of an investigation have been retained.

Clause 7.2 provides that 'An investigation under these procedures that relates to reportable conduct may be combined with, or constitute, an investigation under the CYSOA'.

What does this mean in practice?

The Commission of Inquiry report noted it was critical to cultural change and awareness of the interpretation and application of disciplinary processes that any reforms actively and willingly foster a culture that promotes the safety and protection of children and ensures the safety and wellbeing of children at risk of child sexual abuse or related conduct.

This means that decisions relating to ED5 processes will be approached with this factor as a primary consideration, tailoring the process as appropriate to be sensitive to the needs of children and ensuring witnesses only have to be reinterviewed where absolutely necessary.

All processes should be undertaken with a trauma informed approach and information shared as much as possible within the law and as quickly as possible.

For example, where a delegate forms 'a reasonable belief' in relation to an employee's conduct with a child or young person pertaining to child sexual abuse or related conduct, this should be treated in a way that if substantiated would be a breach of the Code of Conduct and imposition of a sanction such as termination is likely.

Further to provide clarity, where the Regulator requests an Agency to commence an investigation in relation to a reportable conduct under the *Child and Youth Safe Organisations Act 2023*, an ED5 investigation may be commenced and combined with, or constitute, the investigation under the CYSOA, removing the need to carry out duplicate investigations.

It is noted that in the same way as the ED5 matter would progress (in accordance with the State Service Code of Conduct) any reportable conduct in relation to the employee would relate to conduct in the course of employment or arising from or closely connected to employment.



3. Clarification of Possible Criminal Conduct

Under the general provisions of the revised ED5 it has been made clearer that allegations that are a potential breach of the Code of Conduct that may involve possible criminal conduct are to be reported to police (clause 6.5/8.6).

What does this mean in practice?

This is to make clear that ED5 and police investigations are separate processes and that ED5 processes should continue notwithstanding that criminal charges and police investigations may ensue subject to ongoing consultation with police. There may be times when the police request that the ED5 investigation process be suspended due to protecting evidence but this should usually be limited and for short periods. Where this is going to impact on the timeliness of an ED5 investigation, regular communication and liaison with police is to be maintained to ensure any delays are minimised as much as possible.

A referral to the Police alone is not a reason to not continue or delay the ED5 process unless the Police specifically requests to do so, noting that the standard for code of conduct matters is on the balance of probabilities and does not require the same standard of proof as required in criminal matters.

In liaising with Police when a referral is made, discussions with Police are to include reference to the ED5 process and timeframes to ensure the police investigation is not compromised and so that a coordinated approach can be undertaken to ensure both processes can be undertaken in as timely a manner as possible. The ED5 investigation is to continue unless Police request that it is paused. These discussions should be ongoing and consultative, so that information is shared as relevant and appropriate. Where Police are conducting an investigation or have referred a brief of evidence to the Director of Public Prosecutions in relation to the employee, regarding same or similar conduct to allegations within the ED5, ongoing conversations should occur to ensure the status of the Police process is known, to enable the circumstances of each case to be considered prior to progressing the ED5 process.

4. Commencing a Code of Conduct process

Clause 8.1 refers to the commencement of an ED5 process.

Previously where a HoA had reasonable grounds to believe that a breach of the Code may have occurred, the HoA had to commence an ED5 process in accordance with ED5 (formally clause 7.1).

Clause 8.1 now states that '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.'

This significant change provides discretion for a HoA to determine how to deal with specific behaviour or conduct. This provides some flexibility for the HoA when the conduct or behaviour is of a less serious or lower risk in nature.

The Code of Conduct does not differentiate between the seriousness or nature of behaviour that might be considered a breach of the Code of Conduct (there is no

minor or major breaches) This change provides the HoA the ability to assess the behaviour and consider whether it is lower risk or less serious in nature and could be dealt with more effectively and proportionately by managing the behaviour in another way. This may include, through performance management or other management actions such as the issue of a lawful and reasonable direction.

Alleged conduct of a serious or higher risk nature is to continue to be dealt with through the ED5 process as this is the only way that a sanction can be imposed for a breach of the code of conduct.

What does this mean in practice?

There is some flexibility in dealing with lower risk behaviour or conduct that while technically may, on the face of it, meet the threshold for a potential breach of the Code of Conduct it is 'lower risk' and could be dealt with through alternative resolution or in a non-disciplinary manner.

The behaviour or concern should still be referred to the HoA for assessment as to whether an ED5 process should be commenced.

The inclusion of 'may' provides a level of flexibility about how the HoA may choose to deal with the alleged behaviour or conduct – depending on the nature of the behaviour or conduct, processes can be tailored, based on the circumstances. Behaviour may be dealt with as a potential breach of the Code of Conduct or the circumstances may mean the HoA or delegate decides it is more appropriate to deal with the situation in another way.

In making this decision HoA's and delegates should consider:

- Whether the circumstances and nature of the alleged behaviour or conduct are likely to warrant a sanction being applied.
- Has this behaviour or conduct occurred before in the workplace by the employee?
- Whether the circumstances and nature of the alleged behaviour or conduct are serious and the prospects of remedial action being applied are impracticable.
- Is there a risk of repeated behaviour? If so, what action may prevent recurrence? Has the behaviour undermined trust?
- How do you demonstrate the agency's commitment to maintaining proper standards of conduct.
- The nature and circumstances of the behaviour or conduct are indicative of a pattern of behaviour by the employee especially where they have been subject to previous disciplinary or remedial action in the past.
- Whether the alleged behaviour or conduct may constitute a criminal act.
- What may be the impact of the behavioural or conduct on the workplace, and how will this be managed.

Therefore, where a HoA forms 'a reasonable belief' in relation to an employee's conduct with a child or young person pertaining to child sexual abuse or related conduct, such as grooming or a boundary violation, this would clearly be a potential

serious breach of the Code of Conduct and could not be dealt with in any other way, other than as a potential breach of the Code.

There may be some circumstances where managing the behaviour in a way other than as a potential breach of the Code of Conduct still means inquiries occur and the employee is given the opportunity to participate in the process and provide a response. This approach provides the flexibility to deal with low risk matters early and resolve workplace issues in an expedient and timely manner.

It is noted that appropriate internal records should be kept, consistent with information management requirements, to reflect if an ED5 is not commenced and how the behaviour will be dealt with in the alternative. This is in the same way that where a matter is referred to a HoA, and a decision is made to commence an ED5 process, there will be records that will reflect this decision.

5. Circumstances where an Investigator may not be appointed.

Previously, ED5 provided that the HoA must appoint an investigator if the HoA had reasonable grounds to believe that a breach of the Code may have occurred (formerly Clause 7.1).

Under the revised ED, clause 8.4 provides for specific circumstances where a HoA may decide to commence a Code process and not appoint 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); or
- 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.

What does this mean in practice?

There are specific circumstances where a HoA may decide not to appoint an investigator usually because the evidence is already available and the circumstances surrounding the case are obvious and therefore an investigation is unnecessary, another authority has already investigated for the same allegation such as the Office of the Independent Regulator (OIR), or the HOA becomes aware that the employee has been convicted of a crime with a term of imprisonment of 6 months or more.

Unnecessarily appointing an investigator to investigate facts and evidence that is already available can result in additional time, resources and costs.

Where evidence is available capable of proving the alleged breach, it is anticipated this will be in specific circumstances where evidence directly relevant to the alleged breach is available and can be proven, the facts of the situation are clear/uncontested, the employee admits to the alleged behaviour, or a HoA has an

investigative report from another authority such that contains facts/evidence relevant to deciding if a breach of the Code has occurred or not.

Where an investigator is not appointed, a HoA must still advise the employee of the allegation(s), advise the employee of the reasons and evidence relied upon in determining whether a breach has occurred or not, and give the employee the opportunity to respond to the facts, evidence and determination and therefore Code process can be completed with greater efficiency in these circumstances.

In these circumstances, a case manager would assist in collating the facts and evidence and preparing information for the HoA. It is still necessary to properly construct written allegations, afford procedural fairness to the employee and ensure they have the right to respond to the allegations and the evidence being relied upon to determine whether a breach has occurred or not.

Where a breach is determined, a decision in relation to any appropriate sanction(s) consistent with the requirements of ED5, still needs to be made and the employee has the right to respond to that decision in the same way.

It is also noted that there will be matters, where an employee admits to certain behaviour, but due to the nature of the matter, it still may be appropriate to investigate by the appointment of a formal investigator i.e. where the allegations may be of higher risk in nature such as that related to child sexual abuse or involves dishonesty such as fraud related behaviour.

The current ED provided for circumstances where a HoA becomes aware that an employee has been convicted of a crime that the HoA may, after affording the employee procedural fairness, determine whether the Code has been breached without the need for an investigation and this remains.

Any admission by an employee must be fully documented. It is important that the HoA is satisfied that the employee understands the nature of what is being alleged and understands the consequence of making an admission. A HoA should also consider whether an employee is admitting to less than what has occurred to avoid a thorough investigation.

It remains important that proper records are kept and stored appropriately, and that the employee is afforded procedural fairness.

6. New Appendix

Appendix 1 is new and outlines the process where an investigator is appointed by a HoA.

Changes, within the appendix, include that:

- The investigator is to be advised in writing of the scope of the investigation, the allegations and the requirement for a written report.
- Consistent with trauma informed investigations, there is flexibility in the way in which evidence may be provided from those that may have been impacted by trauma.
- The Agency must provide the employee with a copy of the Investigator's Report or now in the alternative, a statement that describes the alleged breaches and

a summary of the evidence. The opportunity for the employee to respond to this information remains unchanged.

7. Timeliness

Timeliness remains an important criterion for Heads of Agencies to comply with in completing ED5 processes. Previously ED5 prescribed that the processes were to be completed in a timely manner meaning within a reasonable time and without reasonable delay.

A new Clause 6.4 requires that processes relating to alleged Code breaches are to be applied with procedural fairness and completed within a reasonable timeframe, appropriate in the circumstances.

What does this mean in practice?

It is recognised that it is difficult to impose a specific set timeframe to managing ED5 processes that can range in risk and complexity. Flexibilities have been introduced that may result in some matters being able to be dealt with expediently, within weeks, others due to the nature or complexity of the circumstances, may be difficult to finalise within several months due to historical nature of evidence or witness availability for example.

Therefore, completing matters within a reasonable timeframe means that the ED5 process needs to be conducted as soon as reasonably practicable – but not at the expense of a more thoroughly conducted process, or procedural fairness obligations.

Agencies should endeavour to ensure that each stage of their ED5 processes are managed as efficiently as practicable, noting that some delays may be outside the HoA control.

Active management of investigations will ensure investigations are undertaken in an efficient manner. As part of the whole of government panel of investigators, an investigator is to be given a maximum of 12 weeks to complete their investigation. Regular updates are to be provided to the Case Manager and where any delays identified, an explanation of the delay and an extension of time is to be sought.

It is noted that there are external review mechanisms available for employees if there is reason to believe that any delays are not reasonable.

The nominated Case Manager can play a key role in the timeliness of the investigation, and Agencies should continue to look for opportunities to make the ED5 process more efficient.

There are a number of other initiatives that have been introduced to ensure more timely processes. Further ones are being addressed through 'shared capability and centralised investigations unit', looking specifically at improvements and greater consistency in Agency processes.

A HoA should also consider whether requests from an employee subject to an ED5 process for multiple extensions of time to respond, or requests for an extended period of time to respond, are reasonable in the circumstances.

Ensuring timeliness is important for a number of reasons. Delays can affect the availability of reliable evidence, and the capacity of the employee subject to a Code process to respond fully to the case against them.

For these reasons, among others, delays in Code of Conduct processes can reduce the likelihood of reaching a concluded view on whether the employee did what they were alleged to have done.

Unreasonable or extended delays in ED5 processes can have an additional impact on the employee, the workplace and other interested parties (ie where there may be a victim-survivor/complainant).

8. The opportunity to respond to Determination of Breach and Imposition of Sanction

In this revised ED5, the determination of a breach of the Code of Conduct and imposition of a sanction have been separated. This acknowledges the different process in accordance with the Act and the fact that different delegates may make these decisions.

It is noted that procedural fairness and the opportunity to respond applies to both the determination of a breach and imposition of a sanction, and in both instances an employee is to be provided the opportunity to respond to those proposed actions and the reasons prior to the decision being made.

What does this mean in practice?

This provides clarity that procedural fairness applies in relation to both a decision that determines a breach and a decision that imposes a sanction.

Agencies may notify employees of a determination and sanction(s) separately or concurrently.

An Agency may vary their approach depending on the circumstances of each matter, also noting that these are two separate actions are capable of determination by different delegates.

9. Sharing of Information

A particular criticism from the Col has been that complainants/victim survivors in particular, did not receive updates on, or the outcomes of ED5 processes.

Clause 12.1 has been added and provides that '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*.'

What does this mean in practice?

The *Personal Information Protection Act 2004* (the PIP Act) prevents advising anyone other than the respondent employee the outcome of the ED5 process, including complainants/victim-survivors.

However, this does not preclude providing regular updates to complainants/victim-survivors as the matter progresses, so they are aware of what stage the ED5 process/investigation may be at, and when it may be finalised.

Where timeframes are anticipated, these may be provided to the employee and the complainant, where this is relevant. Similarly, any unexpected delays should also be communicated.

Additionally, where a HoA decides to take no further action on the allegation(s) or to deal with it otherwise than as an alleged breach of the Code in accordance with clause 8.9 of ED5, both the employee and complainant/victim-survivor could be informed of this, noting the detail of any further action may be considered personal information subject to the PIP Act and only shared with the employee.

Where there is specific authority provided in legislation that enables the sharing of information between relevant regulatory organisations and the Employer, then this also supports the sharing of information ie AHPRA, TRB, WWVP, OIR, Reportable Conduct Scheme, Integrity Commission.

Where relevant, Agencies (as part of the Tasmanian State Service) are able to share information with each other, as it relates to employee information.

To note

- The revised ED5 provides that 'A Code process commenced under the previous Employment Direction is to continue and be finalised in accordance with the revised Direction.'
- Whilst these procedures do not apply to alleged breaches of the Code by Heads of Agencies (clause 2.2), the terms of Heads of Agency employment is provided for in their individual Instrument of Appointment. This includes obligations to uphold and promote the State Service Principles and compliance with the Code of Conduct. The Premier will regulate his own procedure in relation to any allegation into possible breaches of the code of conduct by Heads of Agencies.



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