

REVIEW
into
THE FUNCTIONS AND OPERATIONS
of the
EMPLOYEE PERFORMANCE AND CONDUCT DIRECTORATE
(EPAC)
within the
NEW SOUTH WALES DEPARTMENT OF EDUCATION



Artist's impression of the new Ballina Coast High School. Supplied: NSW Government

REPORT

by

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GLOSSARY

AV – Alleged victim
CHIP – Complaints Handling Improvement Program
DEL – Director Education Leadership
Department – Department of Education, New South Wales
DoE – Department of Education, New South Wales
DPI – Duty Principal Investigator
ED – Executive Director
EDSP - Executive Director School Performance
EPAC – Employee Performance and Conduct Directorate
FACS – Family and Community Services
FACT – Feedback and Complaints Team
FTE – Full time equivalent
FWFA – Fair Warning Fair Action
GREAT- Government and Related Employees Appeal Tribunal
HR – Human Resources
ICAC – Independent Commission Against Corruption
IRC – Industrial Relations Commission
LM – Local Management
LSLD – Local Schools Local Decisions
NCAT – New South Wales Civil and Administrative Tribunal
NCCD - Nationally Consistent Count for Students with Disability
NESA – New South Wales Education Standards Authority
New Law – New Law Pty Ltd
NSWOO – New South Wales Office of the Ombudsman
NSWPF – New South Wales Police Force
NSWPPA – New South Wales Primary Principals Association
NSWSPC – New South Wales Secondary Principals Council
NTBE – Not to be employed (database or list)
OCG – Office of the Children’s Guardian
PID – Public Interest Disclosure
PIT – Preliminary Intake Team
Procedural Guidelines – Guidelines for the Management of Conduct and Performance
PSC – Professional Standards Command (NSW Police)
PSOA – Person the subject of allegation(s)
SECT – Staff Efficiency and Conduct Team
SO&P –School Operation and Performance Division, Department of Education
SSP – School for Specific Purpose
TPMI – Teacher Performance Management and Improvement Project
WWCC – Working with Children Check

EXECUTIVE SUMMARY

This Review was commissioned by Mr Mark Scott AO, the Secretary of the New South Wales Department of Education (DoE), to enquire into the investigation and management of employee misconduct by the Employee Performance and Conduct Directorate (EPAC) of the Department, and to present a Report to the Secretary with recommendations for the improvement of EPAC. EPAC has the important tasks of investigating misconduct by employees of the Department and imposing disciplinary and remedial action. The Executive Director (ED) of EPAC and several of its team Directors hold delegations from the Secretary to impose disciplinary or remedial action against staff who have been found to have committed misconduct. The overriding concern of EPAC is the protection of students and staff and the maintenance of appropriate standards of conduct by all employees of the Department so as to provide an environment where the highest standards of education can thrive.

In order to maintain confidence in EPAC among those who work in the Department and within school communities, it is necessary for EPAC to be seen to act in a fair, impartial, consistent, transparent and timely fashion, and in a manner that respects the procedural rights of those whom it is investigating and disciplining. Over time, criticism has been levelled at EPAC from a variety of sources. Those criticisms have included accusations of: procedural unfairness; lack of timeliness; lack of consistency in decision-making; inadequate investigations; confirmation bias against persons subject of allegations (PSOAs); poor communication with PSOAs, alleged victims (AVs), and school managers; failure to provide support to Principals and Directors Educational Leadership (DELs) in local management of investigations; inadequate resourcing; and a failure to act fairly and impartially in the investigation of allegations of misconduct.

The staff of EPAC consist of well-intentioned people wanting to do a complex and highly pressured job in a professional manner under difficult circumstances. This Review has identified some measures that, if adopted, will go a long way to overcoming the criticisms that have been levelled at EPAC.

ACKNOWLEDGEMENTS

This Review has relied heavily on the more than 105 written submissions that were received from interested parties, including: stakeholder organisations; former PSOAs and their relatives and friends; former complainants and AVs (and their families); officers in other Divisions and Directorates of the DoE; school Principals and DELs; former and present employees of EPAC; and the senior Executives of EPAC. We are very grateful for their assistance. We also acknowledge the contributions of those approximately 40 people – mainly from stakeholder organisations, but also from EPAC – who agreed to be interviewed in person. We also wish to acknowledge the administrative support of Mr Peter Riordan, Deputy Secretary, and Mr Lindsay Cornish, Director, Strategic Initiatives.

Finally, the Reviewer (Mark Tedeschi) would like to acknowledge the phenomenal contribution to the Review and this Report made by his Junior Counsel, Ms Christine Melis. Although this Report is expressed in the first-person plural (we, us, our), the Reviewer takes full responsibility for opinions, views and recommendations expressed in the Report.

OUTLINE OF THE REPORT

The Introduction and Chapters 1-4 are descriptive of methodology, the history of EPAC, its current situation, and a brief comparison with some overseas jurisdictions. Chapters 5-14 look closely at those areas of EPAC that have been of concern and the subject of criticisms in submissions received. Each of those chapters is set out in the following way:

- A brief description of the topic
- A summary of submissions received from stakeholder organisations and individuals
- A response from EPAC to those submissions
- Analysis and Recommendations by the Reviewer.

For those who wish to quickly get to the essence of this Report, we recommend that you go to the “Analysis and Recommendations” sections of chapters 5-14.

CHAPTERS

The terms of reference and methodology of the Review are described in the **Introduction**.

Any review of EPAC has had to take into account the background of legislation, regulations and Departmental policies, guidelines, and the code of conduct. This is examined in **Chapter 1 – Legislative, regulatory and policy framework**.

In order to assess any criticisms that have been made over time of EPAC, it is necessary to look at the work that EPAC has done since its precursor was established under a different name in 1996. In order to make recommendations for any improvements, it has been necessary to understand the current resources, structure, functions and methodology of EPAC, and to examine the way it goes about its core business. These topics are examined in **Chapter 2 – Outline of EPAC**.

It has been instructive to closely examine statistics for both past and recent EPAC activities, to look at programs that EPAC has been involved in, and to consider previous audits and surveys of EPAC and its employees. These are described in **Chapter 3 – EPAC’s record**.

We have examined two overseas systems for investigating complaints of misconduct against teachers: the United Kingdom and British Columbia (Canada). We examine these two systems and compare them to EPAC in **Chapter 4 – International comparisons**.

Many of the criticisms of EPAC, including especially the claim of extensive, unacceptable delays in the completion of investigations, raise the issue of under-resourcing of EPAC. The resourcing of EPAC, both human and digital, is examined in **Chapter 5 – Resourcing of EPAC**.

The decision to investigate an allegation of misconduct is a most important decision that can have serious consequences in itself for PSOs. This stage of the process is examined in **Chapter 6 – Intake of allegations**.

The most complex and time-consuming task of this Review was to examine the conduct of investigation and the manner in which decisions are made within EPAC about whether or not misconduct has occurred and, if it has, what disciplinary or remedial action will be taken. This has involved the very vexed question of how the term “misconduct” is defined. The Review has examined who makes important decisions in EPAC and how they are made. These issues are examined in what is perhaps the most important chapter of this Report in **Chapter 7 – Conduct of investigations**.

Some low-level misconduct and misbehaviour allegation are investigated by local school managers under the guidance and supervision of EPAC. The systems and practices of local management are examined, as well as the extent of supervision by EPAC, and an assessment is made about whether or not it is appropriate for EPAC to maintain guidance and supervision of local managers exercising this role. This chapter also considers Departmental programs for managing low-level misbehaviour. These and other issues are considered in **Chapter 8 – Local Management of low-level misbehaviour allegations**

The initiation of an investigation of misconduct sometimes requires EPAC to manage risk to students and staff on an interim basis pending the outcome of an investigation. Some of these risk management measures can have serious implications for PSOs. These issues are examined in **Chapter 9 – Interim risk management measures**.

In order to ensure confidence in a system of decision-making about misconduct, it is necessary to have some process for either internal review or external appeal. These two aspects are examined in **Chapter 10 – Reviews and appeals**.

In order to maintain confidence in decision-making by EPAC, it is necessary to ensure that decision-makers do not have a conflict of interest. This aspect of decision-making in EPAC is examined in **Chapter 11 – Managing conflicts of interest**.

EPAC also exercises important functions other than the investigation of misconduct. EPAC has a role in the management of performance, the receipt and allocation of consumer complaints, and a program called CHIP to improve the standard of complaints handling throughout the Department. These functions are managed by sections of EPAC known as SECT and FACT. Although it is not part of the terms of reference of this Review for these functions to be examined, we make recommendations about whether or not it is appropriate and desirable for EPAC to continue to have a role in these other areas whilst its core business is the investigation of misconduct. This is considered in **Chapter 12 – The other functions of EPAC: SECT, FACT and CHIP**.

In order to ensure the highest standards of investigations and decision-making, it is necessary for EPAC to provide its staff with good induction programs, ongoing professional development and training opportunities, and access to information about previous cases in EPAC and in other agencies and tribunals. EPAC also plays a very important role in the education of school managers, including Principals, DELs and Executive Directors, School Performance (EDSPs) about their role in making and handling allegations of misconduct. The professional development and training of both EPAC officers and senior educational staff is examined in **Chapter 13 – Professional development and training**.

The last chapter of this Report considers some miscellaneous issues, including: managing allegations of bullying; sick leave and its effect on investigations of misconduct; misconduct involving students with disability; EPAC's interaction with and accountability to external statutory authorities. These are considered in **Chapter 14 – Miscellaneous issues**.

We set out hereunder our recommendations for the improvement of EPAC.

RECOMMENDATIONS

Chapter 5 – Resourcing of EPAC

1. We are of the view that EPAC continues to be seriously under-resourced in terms of the number of investigators. We recommend that sufficient human resources be allocated to EPAC in order to reduce the average caseload of investigators to a level that would result in the average completion times of misconduct investigations being as follows:
 - i. Simple cases: no more than 90 days (3 months)
 - ii. Median cases: no more than 180 days (6 months)
 - iii. Complex cases: no more than 270 days (9 months).Obviously, there will be a small number of highly complex investigations that may take longer than this, but equally there will be some simple cases that should take less than three months. In consultation with EPAC, we have assessed that in order to achieve the above time limits, it would require average caseloads of EPAC investigators to be reduced from the present 20 cases each investigator to 5-10 each investigator. This will obviously require additional investigators to be appointed to EPAC. We believe that at least one additional complete investigative team is required, consisting of a team Director, a Principal investigator, and four investigators. This is in addition to the resources required to place permanent intake officers in the Preliminary Intake Team (PIT) rather than on rotation, as described below and in chapter 6. We therefore recommend an additional 12 positions in EPAC (2 Directors, 2 Principal Investigators and 8 investigators) in order to meet the time limits suggested above.
2. We recommend that the PIT team be enhanced so that its members are no longer rotated from other teams, but instead are permanently deployed to the PIT team, or at least deployed for a period of 6-12 months. As suggested above, this will require the appointment of an additional PIT Director, an additional PIT Principal Investigator and 4 additional PIT intake officers.
3. We recommend that EPAC change its recruitment practices to include applicants with no prior child protection experience or knowledge, but rather to focus on those candidates

with suitable skills in communication (interviewing), location and analysis of evidence, and report writing skills. We are of the view that this will create a larger pool of suitably qualified applicants applying to enter EPAC. We are of the view that the previous focus on prior child protection experience unnecessarily limits the pool of available applicants.

4. We do not recommend that EPAC go back to the system that existed in the mid-to-late 1990s of recruiting school-based staff to conduct investigations, however, this would not preclude an otherwise suitably qualified Principal, DEL or teacher from joining EPAC if that person had the requisite communication, analytical and report writing skills.
5. We recommend against the use of private contractors being used in misconduct investigations. The quality of their work is variable. In our view, they should only be utilised in cases of extreme need.
6. We recommend that EPAC be more diligent in the speedy recruitment of staff that resign, transfer or go on long-term leave, so that vacancies are not left open for many months at a time. We recommend that a concerted effort be made to fill existing vacant positions.
7. We recommend the creation of some investigator positions between the present 7/8 and 11/12 levels, so as to enhance career prospects for those entering EPAC at the base level and encouraging them to stay at EPAC.
8. We recommend that a case rating system should be introduced by EPAC so that at the preliminary intake stage, when a matter is allocated by PIT to a team of investigators, an assessment is made as to the complexity and scale of the investigation, so that cases can be assigned into the three categories listed in recommendation 1 above. Whilst the initial assessment will not always turn out to be accurate, this is still a basic requirement for the efficient and fair allocation of work between investigative teams and between investigators. This will also allow the more senior investigators to receive the more complex cases.
9. We recommend that in the long-term the *Resolve* system be replaced by one which is more amenable to an interface with other computer databases in the Department and one which is more user-friendly and amenable to individual settings.
10. We recommend that the PIT intake form be abandoned, and that all information obtained from complainants be entered directly into the *Resolve* database.
11. We recommend that the *Contact* database be abandoned, and that all information received by EPAC should be recorded directly on the *Resolve* database.
12. We recommend that all EPAC team Directors be required to exercise appropriate supervision of the timeliness of investigations in their team. This will require more frequent and intensive monitoring of investigations by managers. We recommend that case reviews by managers should occur on a monthly basis.
13. We consider that there is merit in the Directorate maintaining its own legal officers, separate from the Department's Legal Services Directorate. This provides the staff of EPAC with ready access to legal advice. In addition, later in this report we make recommendations that, if accepted and implemented, would involve further input by the legal officers of EPAC.
14. EPAC has on many occasions failed to communicate effectively and appropriately with PSOAs, school Principals, DELs, alleged victims, complainants and other stakeholders. While there are established timeframes for EPAC communications with relevant stakeholders, those standards have been ignored by some investigation teams. We recommend that all levels of EPAC management insist that at least once every school

term there is regular communication to update PSOAs, alleged victims, complainants and school managers about the current situation and likely future course of action in every active investigation. In the past, what communication that did occur was of a rudimentary nature, often merely conveying that the investigation was continuing. We are of the view that regular communication should provide more information about the course of the investigation and anticipated timeframes.

Chapter 6 – Intake of allegations

1. We recommend that the staff of the EPAC Preliminary Intake Team (PIT) should be designated PIT employees rather than investigators on rotation. This would mean the appointment of a full-time Director, Principal Investigator and investigators to the PIT. These steps should result in the vast majority of new cases being assessed and allocated by PIT within three days of receipt, rather than the current 10 days. We do not agree that school representatives should play a role in the assessment of new matters.
2. We recommend that there should be a more streamlined approach to the categorisation of matters reported to EPAC. We recommend that instead of the current three categories, there should be only two:

- “Enquiries” (for investigation and management by local school managers);
- Allegations of misconduct warranting investigation by EPAC.

This would involve the abolition of “Local Management” matters that are currently investigated by school Principals or DELs but oversighted by EPAC and remitted back to EPAC for a finding and remedial action. This will require negotiating with the Office of the Children’s Guardian when it takes over the reportable conduct scheme on 1 July 2019.

3. The decision to initiate an investigation is a particularly important one that can have serious consequences for employees. At present, the decision to initiate an investigation is generally made by a PIT Duty Director (who is also a Director of a team of investigators). We recommend that the decision to initiate an investigation should only be made as follows:
 - both the intake officer who receives the original intake report and the Principal Investigator in PIT agree that the threshold for investigation has been reached
 - In the event of a dispute between these two, the Director of the PIT should make the decision.

We do not agree that school representatives should play a role in the assessment of new matters.

4. At the present time, initial details of information provided by phone to an intake officer in the PIT is recorded on a “PIT Form”. If the matter is merely an enquiry of a general nature, it is entered in the *Contact* database. If it is considered an Enquiry, it is entered into the *Resolve* database. If it is considered suitable for Local Management, it is entered into the *Resolve* database. If a matter is categorised as suitable for an EPAC investigation, the details are entered in the *Resolve* database. We are of the view that the use of the PIT form is inefficient. We recommend that all information brought to the attention of EPAC should be entered directly into the *Resolve* database. If necessary, *Resolve* should be engineered so that all information and enquiries can be entered onto it.

5. Complaints accepted for investigation by EPAC should be categorised by an intake officer into one of three different categories (e.g.: simple, median, complex). This sort of categorisation will enable the setting of benchmark timeframes for the completion of each category (e.g.: 3 months, 6 months, 9 months). This will also enable EPAC to provide to the PSOA in the initial letter of notification an estimate of the likely timeframe to complete the investigation of allegations against them. Every effort should then be made to adhere to that timeframe. Obviously, where there are extensive and unavoidable delays, due to parallel police or FACS investigations or due to illness of the PSOA, such timeframes would need to be amended.
6. We agree that the online Decision Tree is a useful innovation, however it would be used much more frequently if it was an interactive program. We encourage the Department to fund the creation of such a program. The online form could also be made more user-friendly to prompt the kind of information that is required for EPAC to make a full and proper assessment of whether an investigation should take place. There is a great need for ongoing education of Principals and DELs in the lodging of allegations of misconduct with EPAC and the management of low-level misbehaviour by local managers. This is discussed further in Chapter 8.
7. The Department should keep centralised records of those lower-level misbehaviour allegations that have been the subject of 'Enquiries' to EPAC that have been sent back to local managers for investigation and resolution. In this way, these matters can be taken into account in the event of repeated misbehaviour or in the event of a subsequent allegation of misconduct.

Chapter 7 – Conduct of investigations

1. The most common complaint against EPAC concerns the lack of timeliness of investigations and decision-making. There still exist unacceptable delays in EPAC's consideration of complaints of misconduct. Delay results in serious trauma to Persons the Subject of Allegations (PSOAs) and causes financial loss to the Department and disruption to schools. Our previous recommendations for additional resourcing of EPAC should result in the lowering of caseloads of investigators and more timely investigations and decision-making. However, there are many additional steps that can be taken to streamline investigations and decision-making in EPAC.
2. A letter of notification of an investigation should be sent to the PSOA at the earliest possible opportunity after allegations have been received by EPAC. Every attempt should be made by EPAC to provide as much specificity as possible in letters of notification to PSOAs about the nature of allegations that have been made. Where there is sufficient specificity of allegations in a letter of notification, the PSOA should be invited to nominate any witnesses that EPAC should interview or to provide any documentation or other information relevant to the investigation. In all but the most complex cases, letters of notification should be sent to the PSOA within one month of allegations being received by EPAC.
3. We recommend that, as a matter of procedural fairness, witnesses nominated by the PSOA should generally be interviewed, and that a decision not to interview them should only be made where there are compelling reasons. We are of the view that those compelling reasons should always be stated in the investigator's report, so that in the event of a finding of misconduct, this report is provided to the PSOA, who then has an opportunity to see the reasons why those witnesses have not been interviewed.

4. We recommend that urgent action be taken to ensure that all EPAC team Directors are required to read the underlying evidence prior to the formulation of letters of allegation sent to PSOAs and prior to the endorsement of investigation reports. In this way, all EPAC Directors will be required to take responsibility for the proper formulation of allegations and recommendations as to findings. In this way it will be less likely that allegations will be made that are not supported by the evidence.
5. EPAC team Directors should be encouraged to express their frank and fearless advice about recommendations that have been made by investigators in cases of alleged misconduct. Differing views should not be discouraged, as they provide additional assistance to the decision-maker.
6. The Executive Director (ED) of EPAC should be discouraged from involvement in or oversight of the investigation process, so as to remain impartial and objective for the purpose of decision-making in cases of serious misconduct. Oversight of investigators can properly and efficiently be carried out by EPAC team Directors and Principal Investigators. There are certain circumstances (discussed in Chapter 7) in which it would be appropriate for the ED to request further investigations or to become involved in interim risk management activities.
7. All delegated decisions by EPAC regarding serious misconduct where disciplinary action may be taken to dismiss an employee, or to direct an employee to resign, or to demote an employee should be made by the delegate only after extensive consultation with a panel consisting of:
 - i. The Executive Director (ED) of EPAC
 - ii. Two of the six Directors in EPAC
 - iii. The Principal Legal Officer of EPAC
 - iv. A Senior Executive from the Human Resources Division of the Department
 - v. A serving or former Executive Director School Performance or DEL who has had recent experience in the school system.

The panel should meet at regular intervals. All members of the panel should be provided in advance with all the papers relevant to each case to be referred to the panel. The convener of the panel should be the ED of EPAC. Each case for decision should be presented to the panel by the Director in whose team the investigation has taken place. The Principal Legal Officer of EPAC should provide to the panel details of similar previous cases and their outcomes. The ED should encourage rigorous consultation, discussion and debate about each case prior to a final decision being made by the ED at panel meetings. After each meeting, the Principal Legal Officer of EPAC should prepare a brief summary of each matter and the final decision, in order to provide it to all EPAC professional staff as an educational tool. The Principal Legal Officer of EPAC should also prepare a brief, anonymised summary of the case, including the decision and the disciplinary action taken, for dissemination to all employees in the Department. This will provide a valuable educational tool for all employees. These procedures for major decision-making should be made known throughout the Department and to all relevant stakeholders.

8. We recommend the revocation of delegations to EPAC team Directors giving them the power to demote employees of the Department who have been found to have engaged in misconduct. We are of the view that this career-defining disciplinary action should be reserved to the Executive Director of EPAC, assisted by a panel as suggested above. We do not recommend the revocation of the delegation for EPAC Directors to fine.

9. All delegated decisions by EPAC team Directors regarding less-serious misconduct where disciplinary action of a minor kind may be taken (to issue a caution, reprimand, warning or fine) should be made by the delegate only after extensive consultation with a panel consisting of:
 - i. The delegated team Director (who is not the Director of the team that has investigated the matter)
 - ii. One other EPAC team Director (again not from the team that has investigated the matter)
 - iii. A Legal Officer of EPAC
 - iv. The investigator who has prepared the investigation report.

The panel should meet at regular intervals. All members of the panel should be provided in advance with all the papers relevant to each case to be referred to the panel. The convener of the panel should be the delegated team Director. Each case for decision should be presented to the panel by the investigator who has prepared the investigation report. The Legal Officer of EPAC should provide to the panel details of similar previous cases and their outcomes. The convener should encourage rigorous consultation, discussion and debate about each case prior to a final decision being made by the delegate at the panel meetings. After each meeting, the Legal Officer of EPAC should prepare a brief summary of each matter and the final decision, in order to provide it to all EPAC professional staff as an educational tool. The Legal Officer of EPAC should also prepare a brief, anonymised summary of the case, including the decision and the disciplinary action taken, for dissemination to all employees in the Department. This will provide a valuable educational tool for all employees. These procedures for major decision-making in less serious cases of alleged misconduct should be made known throughout the Department and to all relevant stakeholders.

10. There is a lack of guidance and established policies and procedures to assist EPAC intake offices, investigators and decision-makers to know what constitutes “misconduct”. We are of the view that the absence of guidelines, policies & procedures and a database of previous cases affects not only the PIT, but indeed all investigators, managers and decision-makers in EPAC. In our view, this is why there have been many submissions made to the Review that the decisions of EPAC at every level are arbitrary and inconsistent. We recommend that there be a new, more specific definition of “misconduct” which, in our view, will provide considerable assistance to investigators and decision-makers at every level of EPAC. We have included in our analysis in Chapter 7 a suggested new definition.
11. We are of the view that there is an urgent need for a database of EPAC decisions in previous cases, so that investigators can compare them to cases at hand. The Principal Legal Officer of EPAC and their legal staff should work towards producing a database of previous EPAC decisions and also the decisions of other agencies and Tribunals in relevant cases, including the NCAT and the Office of the Children’s Guardian. The database should include a brief account of the alleged facts, findings and disciplinary outcomes. This database should be made available to all EPAC professional staff to assist in making recommendations and decisions at every level.
12. Where final disciplinary action has been taken against a permanent or casual teacher, and that action has been to grant a limited right to do casual teaching for a period of up to one year, that teacher should be required to provide to the Department referee reports from at least two of those Principals for whom they have done casual work for at

least the equivalent of a month's work at each school. It should no longer be permissible for a teacher to provide a referee report from a Principal after working for only a few days. It should not be an excuse that the teacher has not been able to obtain sufficient casual work.

13. There should be much more specificity in letters addressed to employees advising them that they have been placed on the Not to Be Employed (NTBE) list. In particular, it should be specified whether, and under what circumstances or after what length of time, they will be eligible to apply to be removed from the NTBE list. Where employees are placed on the list temporarily pending an investigation, they should be advised of this. Where employees have been placed on the list because of mental health, drug, alcohol or other similar issues, they should be advised specifically what kind of documentation they will need to provide to the Department if they wish at some stage to be removed from the list. If there is a condition that they will be eligible to apply to be taken off the list after a specified length of time, that time should be stated, and any other conditions should also be stated.
14. We are of the view that the circumstances in which EPAC matters are listed in *Resolve* as "discontinued" are so varied that they should be recorded in different categories for different outcomes. These additional categories should be available on *Resolve*. Where allegations cannot be sustained because of an absence of evidence, there should be a finding of "No sufficient supporting evidence". Where there are extenuating circumstances, such as death or ill-health, there should be a finding of "Discontinued for extenuating circumstances". Where the matter has been discontinued because of separation from the Department, there should be a finding of "Separation from the Department". Cases in which the alleged victim has refused to cooperate with an enquiry should be categorized as "Alleged victim uncooperative".

Chapter 8 – Local management of low-level misbehaviour allegations

1. The current category of "Local Management (LM) complaints" received by EPAC at the intake stage should be abolished. In lieu of this category, those matters previously categorised as LM matters should be assessed by the intake process identified in chapter 6 and categorised either as "Enquiries" or as matters suitable for investigation by EPAC because there has potentially been misconduct. Those matters categorised as Enquiries should be remitted back to school managers for resolution at the local level.
2. EPAC should continue to provide website and training support for local school managers in the investigation and resolution of low-level misconduct in schools.
3. EPAC should negotiate with the Office of the Children's Guardian about these changes when that Office takes over the reportable conduct scheme.

Chapter 9 – Interim risk management measures

1. We are of the view that the most serious interim risk management measures (suspension with or without pay, direction to perform alternative duties, placement of name on the NTBE list) should only be taken in circumstances where there is no other way to avoid an unacceptable risk to students or staff. We recommend that in most cases sufficient information should be provided to the PSOA to explain the reasons why the decision has been made to remove the employee from their normal workplace or deny them access to casual work. We recognise that in some cases (e.g.: when a police investigation is yet to be completed) this may not be possible.

2. Where possible, the PSOA should have a right to be heard prior to the decision being made to impose such risk management measures, and, in the event of an urgent decision to remove an employee, there should be a right to be heard within seven days of the decision being made. We recognise that in some cases this may not be possible.
3. We recommend that the most serious interim risk management decisions (suspension with or without pay, direction to perform alternative duties, placement of name on the NTBE list) should be made in the same way as final decisions about serious misconduct. Where such interim measures are not urgent, we are of the view that they should be made by the ED of EPAC in the same panel environment that has been described in Chapter 7. We acknowledge that in some circumstances the ED of EPAC will need to make these risk management decisions urgently. In such circumstances, we can see no reason why such decisions should not be confirmed by the ED after consultation in a panel environment.
4. We recommend that when an interim decision has been taken to remove an employee from the school environment, whenever possible, school managers should be provided with the best estimate of how long the investigation is likely to take. School managers should be kept informed on a regular basis of the progress of an investigation and anticipated timeframes. We recognise that in some cases this may not be possible.
5. We recommend that suspension without pay during the investigation of allegations of misconduct should occur only in the most extreme cases where there is overwhelming evidence of guilt of a serious criminal offence that renders the employee unfit to resume employment at any time. It should not be sufficient that the employee has been charged with a criminal offence, without a consideration of the strength of the evidence implicating the employee in that offence.
6. EPAC should continue to issue other directions to PSOAs to safeguard the integrity of their investigations and for the protection of complainants, alleged victims and the school community generally. In the event of a breach of a direction coming to the attention of EPAC, swift action must be taken. This may require an employee being placed on alternative duties or, in extreme cases, suspension. Letters of direction should clearly warn PSOAs that breaches may result in such action.

Chapter 10 – Reviews and appeals

1. We recommend that the present system of discretionary internal reviews of EPAC decisions in misconduct cases should be abolished. We believe that it is important for EPAC to get decisions right in the first place. If the steps and processes that we have recommended in other chapters are implemented, we are of the view that the standard of decision-making in EPAC will be substantially improved and that PSOAs, school communities, and the public will have greater confidence in the whole process. There are existing avenues of appeal, including to the Industrial Relations Commission, which involve complete rehearing by an independent tribunal.
2. We would encourage the Department to take a more robust approach to cases in the Industrial Relations Commission. It is not necessarily a good thing that there have been no successful appeals in the IRC. A proper and robust system of investigating and addressing misconduct should result in some matters being successfully appealed in an industrial tribunal. This will ensure that EPAC is setting the bar of acceptable conduct at an appropriate level.

Chapter 11 – Managing conflicts of interest

1. Internal conflicts and disputes between school staff, including bullying, should continue to be managed by Principals and DELs, who are in the best position to deal with such issues expeditiously and with the benefit of local knowledge. EPAC should continue to only be involved in such matters where there is an allegation that could amount to misconduct warranting disciplinary or remedial action.
2. The Executive Director of EPAC should not be the decision maker in allegations of misconduct involving employees at the same level or at a higher level than him or her. Instead, the decision should be made in a panel environment by a delegate who is a Departmental Deputy Secretary who is not the line manager of the PSOA. We have made recommendations for the membership of such a panel.

Chapter 12 – The other functions of EPAC: SECT, FACT and CHIP

1. We recommend that SECT remain in its present location within EPAC. It is so universally admired for its good work that it would be quite contraindicated to move it to one of the other Divisions of the Department. The SECT has a number of employees with recent school-based experience. At the present time these employees are available to the EPAC investigators to gain a school-based context when conducting investigations. If SECT were to be removed from EPAC, this resource would be removed from investigators.
2. We can see no logical reason why EPAC has been given the role of receiving and allocating consumer complaints to other Divisions of the Department. Consumer complaints are quite different to allegations of misconduct. We are of the view that FACT and the CHIP program should more logically be placed elsewhere in the Department, such as in the HR Division or even the SO&P Division. This will allow EPAC to focus more intensely on its core business of managing misconduct and staff performance.

Chapter 13 – Professional development and training

1. We recommend that EPAC conduct induction training for new staff at least once each year. We are of the view that new investigators would benefit from spending a small amount of time in the classroom of a primary school, a secondary school, and an SSP as part of the induction process for new investigators.
2. We recommend that there be additional opportunities for existing EPAC staff to receive continuing professional development in the areas of:
 - Interviewing skills (particularly of children)
 - Investigation skills
 - Evidence gathering, testing and analysis skills
 - Report writing skills
 - The threshold for misconduct
 - Updates on disciplinary decisions in EPAC and in other agencies and tribunals.
3. As previously stated in Chapter 7, the creation of a database of previous EPAC cases will not only serve as an important basis for consistency in recommendations and decision-making, but will also serve as a resource for the training and professional development for EPAC staff.
4. We recommend that EPAC team Directors and/or EPAC Principal Investigators be required to engage in genuine case management with their team members at least once

each term. This is not only an effective management tool, but also a good form of training and development for investigators.

5. We recommend that funding be made available to EPAC for the employment of a high-level Education Officer so that EPAC can provide appropriate induction courses for new EPAC staff and continuing professional development for its existing staff. The employment of an EPAC Education Officer will also go some way to ensuring that EPAC can meet requests from school managers and DELs for education and training at Principals' Network meetings, Regional Principal's Conferences, Area Principals Council meetings, and other similar meetings and conferences. This Education Officer would also be able to further develop and update e-learning modules for the Department's website. The appointment of an Education Officer to EPAC will relieve EPAC team Directors and Principal Investigators from some of the obligations to attend meetings and conferences, which takes them away from their core functions.
6. We recommend that EPAC be encouraged to publish anonymized accounts of cases of misconduct that it has investigated, together with disciplinary or remedial action that has been taken. This will be a significant educational tool for all employees of the Department.
7. We recommend that there should be more rigorous training of Directors and Principal Investigators in management skills and managerial responsibilities.

Chapter 14 – Miscellaneous issues

1. We recommend the introduction of a "teacher impairment program" to assist teachers with mental health or substance abuse issues to return to the workplace. Such a program has been successful in the health professionals' field.
2. We recommend that EPAC should play a more significant role in investigating repeated breaches of directions under the "Fair Warning, Fair Action" policy of the Department. This will go some way to restoring confidence in that policy.
3. If the recommendations in this Report are accepted and implemented, the draft Procedural Guidelines should incorporate suitable provisions in accordance with our recommendations.



Mark Tedeschi AM QC

Reviewer

28 June 2019

INTRODUCTION

Terms of reference

The purpose of the Review is to examine and make recommendations to the Secretary of the NSW Department of Education (Department) about how employee misconduct is investigated and managed by the Employee Performance and Conduct Directorate (EPAC), and to identify areas for improving operational efficiency, the timeliness of outcomes, as well as opportunities to enhance stakeholder perceptions about aspects like independence and procedural fairness.

The specific focus of the review is on the investigation stream, and the way allegations of staff misconduct are referred to EPAC, and how those allegations are investigated, managed and assessed.

The Review has been tasked to examine and make recommendations about:

- the structure and adequacy of resources currently deployed in the EPAC Directorate
- the roles, responsibilities and functions of EPAC
- investigation practices and procedures in use within EPAC
- how procedural fairness considerations are incorporated into investigative practice and procedure and demonstrated as part of the investigation process
- the tools, systems and processes used to manage cases under investigation including monitoring and reporting on the time taken to finalise investigations
- opportunities for improving the timeliness of investigations while maintaining the quality of investigative outcomes.

The Review has also considered how similar investigative functions are managed by other agencies, both within and outside NSW, in both educational and other professional settings.

Although the Review has had access to many case files of EPAC, we have not made findings about the investigations or outcomes of any individual cases, either past or present.

The Review

EPAC presently sits within the Corporate Services Portfolio of the Department. It is anticipated that EPAC will soon be relocated within a new Portfolio of the Department.

EPAC investigates allegations of misconduct by employees of the Department, including allegations of a child protection nature, and takes appropriate disciplinary or remedial action where allegations are sustained. The protection of children is the paramount consideration in taking any action with respect to misconduct by an employee. EPAC also

works to manage the performance of employees and manages the Department's consumer complaints reporting system.

This Review has only considered EPAC's investigations of misconduct, including how allegations of employee misconduct are referred to, received and investigated by EPAC, and how determinations are made about disciplinary measures and remedial action.

The Review informed itself through a number of different sources and avenues of inquiry. It received over 100 written submissions from a range of organisations and individuals, including stakeholder organisations, individuals who have been persons the subject of allegations (PSOAs), complainants to EPAC and their families, leaders of other Divisions of the Department, former and current employees of EPAC, and others. Some submissions were received on an anonymous and confidential basis.

EPAC has previously been the subject of review and recommendations in two inquiries.¹ This Review has had regard to the reports of both inquiries.

The Review has also examined the investigative frameworks of some interstate counterparts of EPAC, as well as other complaint handling bodies, to better understand best practices in the handling, investigation and decision making of complaints.

The proper and efficient management of allegations of employee misconduct in the Department is of great significance in maintaining public confidence in our public education system. Every effort must be made to ensure that the management of allegations, and the systems and processes supporting it, are of the highest calibre in order to deliver optimal outcomes.

The Department, through EPAC, must meet its statutory and regulatory responsibilities to investigate allegations of misconduct with an overriding concern for the protection and welfare of students, but taking into account the requirements of procedural fairness and the desirability of timely outcomes. This Review makes recommendations that are designed to enhance the operations and outcomes of the Directorate by ensuring that investigations of alleged misconduct are efficient, timely and uphold the principles of procedural fairness, while decision making processes are consistent, transparent and fair.

Conduct of the Review

The Review received over 100 written submissions, both through the Department's dedicated website portal and directly to Mark Tedeschi AM QC.

Submissions were received from the following stakeholder organisations and subsequent interviews were held with their senior representatives:

¹ The NSW Ombudsman Inquiry into behavior management in schools (August 2017); Parliamentary Inquiry into the Education of Students with Disability or Special Needs in NSW (September 2017).

- The Public Service Association (PSA)
- The NSW Primary Principals Association (NSWPPA)
- The NSW Secondary Principals Council (NSWSPC)
- NSW Teachers Federation (TF)
- School Operations and Performance Division of the Department (SO&P)
- NSW Children’s Guardian (OCG)
- New Law Pty Ltd (New Law)
- Federation of Parents and Citizens Associations of New South Wales (FPCA)
- New South Wales Education Standards Authority (NESA)
- EPAC Directorate.

The Review also met with:

- The NSW Ombudsman and his two deputies responsible for overseeing complaints about the Department, public interest disclosures and reportable allegations under the reportable conduct scheme
- Senior officers of the Department of Education
- Representatives of the Department’s Human Resources team
- The Commander, Investigations & Field Services of the Professional Standards Command of the New South Wales Police Force
- The Delegate of the Children’s Guardian
- Representatives of the legal services section of the Office of the Children’s Guardian
- Representatives of the New South Wales Secondary Principals Association, including its President and Senior Executives
- Representatives of the New South Wales Primary Principal’s Association, including its Deputy President, Chair Legal Issues Reference Group and Professional Support Officer
- Representatives of the NSW Teacher’s Federation, including its President, Deputy Secretary (Industrial/Research and Professional Support), Professional Support Officer and Industrial/Research Officer.
- Representatives of the Public Service Association of New South Wales
- Representatives of the New South Wales Education Standards Authority
- The Principal Solicitor and Managing Director of New Law
- Current staff members of EPAC.

The Review also met on two occasions with the Executive Director of EPAC and visited the premises of EPAC (they have since moved).

Other submissions were received from persons in the following categories:

- PSOAs who were formerly the subject of an EPAC investigation
- PSOAs who are currently the subject of an EPAC investigation
- Complainants to EPAC
- School Principals
- School teachers and head teachers

- Departmental Directors Education Leadership (DELs) (formerly District Inspectors) and Executive Directors School Performance
- Relatives and friends of persons who have been the subject of an EPAC investigation
- Relatives and friends of complainants of misconduct
- Current and former Departmental employees
- Current and former EPAC employees

Consultation

The Review considered how similar investigative functions are managed by other agencies, both domestically and internationally. Agencies that the Review examined within Australia were:

- The Education Queensland Ethical Standards Unit
- The Employee Conduct Branch within the Victorian Department of Education and Training
- The NSW Police Force Professional Standards Command
- The NSW Law Enforcement Conduct Commission
- The Office of the Children’s Guardian in processing working with children check clearances.

Agencies that the Review examined outside Australia were:

- Teaching Regulation Agency, Department of Education, United Kingdom
- Teacher Regulation Branch of the Ministry of Education, British Columbia

Review of EPAC files

In order to better inform ourselves about EPAC’s practices and procedures, the Review examined about 40 EPAC misconduct investigation files – including both child protection and non-child protection matters. Those files were of assistance in identifying those areas of EPAC requiring change or improvement. As previously stated, it was not our role to make any findings or recommendations about individual cases.

CHAPTER 1

LEGISLATIVE, REGULATORY AND POLICY FRAMEWORK

Legislative functions of EPAC

EPAC's legislative functions, on behalf of the Department, are:

- Investigating allegations of misconduct in accordance with the *Teaching Service Act 1982*, the *Education (School Administrative and Support Staff) Act 1987*, and the *Government Sector Employment Act 2013*; and
- Meeting the Department's obligations under the *Ombudsman Act 1974*, the *Child Protection (Working with Children) Act 2013*, the *Independent Commission against Corruption Act 1988* and the *Public Interest Disclosures Act 1994*.

Legislative background

The 2006 amendments²

In 2006, the Lemna Government amended the *Teaching Service Act 1990*, the *Technical and Further Education Commission Act 1990* and the *Education (School Administrative and Support Staff) Act 1987* to create a new framework for dealing with allegations of misconduct by persons employed under the Acts.

Under the pre-2006 regime, a "mini-trial" was held before a departmental official, known as a "prescribed officer", during which witnesses, including children, would be required to give evidence and be cross-examined by lawyers, or even by the employees themselves. Child witnesses were denied many of the protections afforded to them during criminal trials. The mini-trial occurred after an investigation into allegations of misconduct, which included interviewing and taking of statements from witnesses. At the conclusion of the investigation, if it was considered that misconduct had been established, the matter was referred to the prescribed officer to conduct the mini-trial. All the issues that had already been the subject of the investigation were dealt with again during the mini-trial. The outcome had been described as a protracted, bureaucratic and legalistic disciplinary process, which was often weighed down by technical legal aspects rather than focusing on the substantive merits of the case. This process had a detrimental impact on child complainants and other witnesses, while lengthy delays adversely affected the subject employee and the workplace. It was not unusual for matters concerning teacher performance to take up to 15 months to resolve, or for teacher misconduct matters to take up to two years. These delays caused the system to be severely criticised.

² Second reading speech, 3 May 2006, Education Legislation Amendment (Staff) Bill.

The 2006 amendments were said to provide a faster and less complex process for dealing with misconduct. The new disciplinary procedures were intended to cut red tape while continuing to ensure that employees received procedural fairness. Under the 2006 reforms the mini-trial was abolished and replaced with a “streamlined system based on that applicable to public servants under the *Public Sector Employment and Management Act 2002*” (as it was then called). Detailed procedures for the new disciplinary system were contained in guidelines. The amending Act provided that the guidelines would provide procedural fairness to employees.

The amendments also provided for:

- 12 different categories of breaches of discipline were replaced with one general category of misconduct
- Remedial action as an alternative to disciplinary action for misbehaviour of a less serious kind
- Powers of suspension were strengthened, and salaries of suspended employees could be withheld
- Dismissal would automatically result from a serious criminal conviction
- Express provisions were enacted to make the protection of children of paramount importance when dealing with disciplinary matters.

The legislation after the 2006 amendments: the Teaching Service Act and the Education (School Administrative and Support Staff) Act

Overview

The *Teaching Service Act* governs those persons employed in the Teaching Service of New South Wales, including those with appropriate qualifications to be employed in the Teaching Service who are accredited under the *Teacher Accreditation Act 2004*.³

The *Education (School Administrative and Support Staff) Act* governs school administrative and support staff in the Department.

The Secretary may delegate to an authorised person⁴ any of the functions of the Secretary under the *Teaching Service Act*⁵. A similar delegation exists under the *Education (School Administrative and Support Staff) Act*.⁶

³ Section 47(1) of the *Teaching Service Act 1980*.

⁴ An authorised person means:

- (a) an officer or temporary employee, or
- (b) a Public Service employee, or
- (c) a member of staff of the TAFE Commission.

⁵ Other than the power of delegation or the functions conferred or imposed under s. 100 (Regulations) under the Act: s. 8(1) of the *Teaching Service Act 1980*. However, s. 8(2) provides that “A delegate may sub-delegate to an authorised person any function delegated by the [Secretary] if the delegate is authorised to do so by the [Secretary].”

⁶ Section 34.

The Executive Director of EPAC has received a delegation as a decision maker in all matters relating to misconduct under the Acts.

Part 4A of the *Teaching Service Act* relates to the management of conduct and performance. The provisions apply only to permanent employees employed by the Department under that Act. Similar provisions apply to permanent employees under Part 6 of the *Education (School Administrative and Support Staff) Act*. Part 4A does not apply to temporary or casual employees. Section 50 of the *Teaching Service Act* governs the employment and termination of temporary (and casual) employees. Likewise, s. 21 of the *Education (School Administrative and Support Staff) Act* governs the employment and termination of temporary employees.

Where a temporary employee is the subject of allegations of misconduct and there are concerns about the risk to children if that person continues to engage in work, they are generally informed that their casual teaching approval is withdrawn and they are temporarily placed on the Department's *Not to be Employed* (NTBE) database pending the outcome of an investigation.⁷ Final outcomes determine whether the employee maintains his/her casual approval or whether their name is permanently or temporarily placed on the NTBE list.

Both Acts make provision for dealing with persons convicted of a serious offence punishable by imprisonment for 12 months or more, and for persons barred from working with children.⁸ Where a person has been convicted of a criminal offence, disciplinary and/or remedial action may be taken in respect of them.

A permanent or temporary employee:

- whose working with children check clearance is cancelled; or
- who is convicted of an offence specified in Schedule 2 of the *Child Protection (Working with Children) Act 2012*; or
- who is required to hold, but is not the holder of a working with children check (WWCC) clearance

is dismissed under both Acts.

Procedures for dealing with allegations of misconduct

The protection of children is the paramount consideration in taking any action for misconduct against an employee under both Acts.⁹ The Department also has a responsibility to ensure that its employees are treated fairly and the rights of individuals are

⁷ See the Department's brochure "*Working with Children Check Procedure*", 14 February 2017. ; S.7E of the *Education (School Administrative and Support Staff) Act* provides for the preparation and maintenance of a list of persons who the Secretary determines are not to be employed as members of the school administrative and support staff.

⁸ See s. 93K and 93T of the *Teaching Service Act 1980* and s. 32C and 32K of the *Education (School Administrative and Support Staff) Act 1987*.

⁹ Section 5A of the *Teaching Service Act 1980* and Section 7A of the *Education (School Administrative and Support Staff) Act 1987*.

respected during an investigation and disciplinary process.¹⁰ An officer who faces an allegation of misconduct:

- (i) is advised in writing of the alleged misconduct and that the allegation may lead to disciplinary action being taken with respect to the officer, and
- (ii) is given an opportunity to respond to the allegation, and
- (iii) an officer against whom disciplinary action is being proposed, is given a reasonable opportunity to make a submission in relation to that proposed action.¹¹

If an allegation is made that an employee may have engaged in any misconduct, the decision maker may:

- (a) deal with the allegation as a disciplinary matter in accordance with the procedural guidelines; and/or
- (b) take remedial action with respect to the officer.¹²

Disciplinary action means any one or more of the following:

- dismissing the employee
- directing the employee to resign, or to be allowed to resign, within a specified time
- reduction of the employee's salary or demotion to a lower position
- the imposition of a fine
- a caution or reprimand.¹³

Remedial action means any one or more of the following:

- counselling
- training and development
- monitoring the employee's conduct or performance
- implementing a plan addressing unsatisfactory performance
- the issuing of a warning to the employee that certain conduct is unacceptable or that the employee's performance is not satisfactory
- transferring the employee to another position that does not involve a reduction of salary or demotion to a lower position
- any other action of a similar nature.¹⁴

¹⁰ Responding to allegations against employees in the area of child protection, 2017, p3.

¹¹ Section 93D(3) of the Teaching Service Act 1980; s. 30(3) of the Education (School Administrative and Support Staff) Act 1987.

¹² Section 93F of the Teaching Service Act 1980 and s. 32 of the Education (School Administrative and Support Staff) Act 1987.

¹³ Section 93B of the Teaching Service Act 1980 and s. 28 of the Education (School Administrative and Support Staff) Act 1987.

¹⁴ Section 93B of the Teaching Service Act 1980 and s. 28 of the Education (School Administrative and Support Staff) Act 1987.

The meaning of misconduct

The meaning of misconduct under the *Teaching Service Act* and the *Education (School Administrative and Support Staff) Act* includes:

- (a) a contravention of any provision of the Act or the regulations,
- (b) engaging in, or having engaged in, any conduct that justifies the taking of disciplinary action,
- (c) taking any detrimental action (within the meaning of the *Public Interest Disclosures Act 1994*) against a person that is substantially in reprisal for the person making a public interest disclosure within the meaning of that Act,
- (d) taking any action against a person that is substantially in reprisal for an internal disclosure made by that person.¹⁵

A consideration of the definition of “misconduct” and its practical application is discussed further in Chapter 7 – Conduct of investigations.

Requirements relating to disciplinary matters

The legislature has provided in both Acts that:

- An employee is not entitled to cross-examine any person in relation to an allegation of misconduct or the taking of disciplinary action against him or her.
- A hearing involving the legal representation of parties and the calling of witnesses is not to be held in relation to an allegation of misconduct or the taking of disciplinary action against an employee.
- There is nothing to prevent an investigator:
 - Conducting investigations into an allegation of misconduct, or
 - Asking an employee a question in relation to an allegation of misconduct, or
 - Conducting interviews with the officer to whom the allegation relates or with any other person in connection with the matter concerned, or
 - Taking signed statements from the officer or any such person.¹⁶

If the decision maker is of the opinion that the employee has engaged in misconduct, they may decide to take disciplinary action with respect to that employee.¹⁷ However, before any disciplinary action is taken, the employee must be given an opportunity to make a

¹⁵ Section 93C of the *Teaching Service Act 1980*; s. 29 of the *Education (School Administrative and Support Staff) Act*.

¹⁶ Section 93E of the *Teaching Service Act 1980* and s. 31 of the *Education (School Administrative and Support Staff) Act 1987*.

¹⁷ Section 93F(2) of the *Teaching Service Act 1980* and s. 32(2) of the *Education (School Administrative and Support Staff) Act 1987*.

submission in relation to the disciplinary action that the decision maker is considering taking.¹⁸

Even though the decision maker decides to deal with an allegation of misconduct as a disciplinary matter, the decision maker may, at any stage of the process:

- (a) Decide to take remedial action with respect to the officer concerned as well as dealing with the allegation as a disciplinary matter, or
- (b) Decide to take remedial action with respect to the officer instead of dealing with the allegation as a disciplinary matter, or
- (c) Decide to dismiss the allegation, or decide that no further action is to be taken in relation to the matter.¹⁹

In cases in which the allegations indicate that an employee may pose an unacceptable risk to a student or students, the Executive Director (ED) of EPAC and the Director of EPAC's Staff Efficiency and Conduct Team (SECT) have the delegation to:

- Place an employee on alternative duties, or
- Cease a temporary contract and place the name of the person temporarily onto the NTBE database.²⁰

Suspension

If an allegation that an employee has engaged in misconduct is being dealt with as a disciplinary matter, the decision maker may suspend the officer from duty until the allegation of misconduct has been determined. Any salary payable while the officer is suspended from duty is, if the decision maker so directs, to be withheld. The salary withheld is forfeited to the State unless the decision maker otherwise directs or that salary was due to the person in respect of a period before the suspension was imposed.²¹

In its submission to this Review, EPAC stated that it utilises suspension with or without pay only in exceptional circumstances, to manage risk, in line with the *Premiers Memorandum – M1994-35 Suspension of Public Employees from Duty*. These circumstances include:

Suspension with pay will occur when:

- A person is in a remote location and alternative duties are not a viable option.
- It is unsafe for other employees to have the person attend alternative duties.

¹⁸ Section 93F(3) of the Teaching Service Act 1980 and s. 32(3) of the Education (School Administrative and Support Staff) Act 1987.

¹⁹ Section 93F(4) of the Teaching Service Act 1980 and s. 32(4) of the Education (School Administrative and Support Staff) Act 1987.

²⁰ EPAC submission, p13.

²¹ Section 93L of the Teaching Service Act 1980 and s. 32D of the Education (School Administrative and Support Staff) Act 1987.

- The period is so short it is impractical to make alternative duty arrangements.²²

Suspension without pay will occur when:

- An employee has repeatedly failed to follow directions while on alternative duties and poses a risk to children or other employees.
- The person has a Working with Children Check bar and/or does not hold the required credentials to teach.
- Bail conditions preclude attendance at a school or workplace including conditions not to use a computer.
- A person is in custody.

The Review has been alerted to various concerns regarding the decision to place an employee on alternative duties or to suspend with or without pay. The Review deals with this issue in Chapter 9 – Interim risk management measures.

Appeal and review

There is no right of internal review against a finding of misconduct or a decision to impose disciplinary or remedial action. However, an appeal against a decision made under the Acts lies by law to the Industrial Relations Commission (IRC).

The Review was informed by EPAC that on occasion, when a person subject of an allegation (PSOA), or a parent or another stakeholder, complains to EPAC about the investigation process and requests a review, the Executive Director (ED) refers such requests to an EPAC Director (generally the Director, Systems & Practice) who has not handled the matter before. The issue of internal reviews and external appeals is dealt with in Chapter 9.

NSW Ombudsman

Under the *Ombudsman Act (NSW) 1974*, the Ombudsman must be notified of those allegations involving departmental employees that amount to reportable conduct. The department must also report to the Ombudsman the outcomes of these allegations and what action has been taken. EPAC reports to the Ombudsman as soon as practicable after notification of a reportable allegation, and in any event within 30 days.

Section 25A of the *Ombudsman Act* defines reportable conduct as:

- (a) *any sexual offence, or sexual misconduct, committed against, with or in the presence of a child (including a child pornography offence or an offence involving child abuse material (within the meaning of Division 15A of Part 3 of the Crimes Act 1900)), or*
- (b) *any assault, ill-treatment or neglect of a child, or*

²² EPAC submission, p13.

- (c) any behaviour that causes psychological harm to a child, or
- (d) any offence under section 43B or 316A of the Crimes Act 1900, whether or not, in any case, with the consent of the child concerned.

Reportable conduct does not extend to:

- (a) conduct that is reasonable for the purposes of the discipline, management or care of children, having regard to the age, maturity, health or other characteristics of the children and to any relevant codes of conduct or professional standards, or
- (b) the use of physical force that, in all the circumstances, is trivial or negligible, but only if the matter is to be investigated and the result of the investigation recorded under workplace employment procedures, or
- (c) conduct of a class or kind exempted from being reportable conduct by the Ombudsman under section 25CA.”

In 2004, 2010 and 2017, the Ombudsman made Class or Kind Determinations under s. 25CA of the *Ombudsman Act*, which exempt the Department from the obligation of reporting certain classes or kinds of reportable conduct, provided that these cases are the subject of investigative action by the Department.²³

From time to time, the Ombudsman audits the manner in which EPAC has dealt with reportable conduct allegations against its employees, as well as monitoring the matters that the Department has deemed as exempt from reporting to the Ombudsman under the “Class or Kind Determinations”. The Ombudsman provides feedback and advice directly to the ED of EPAC when deficiencies in investigations are identified.

We have been informed by the Ombudsman’s Office that in 2018 they reviewed 422 completed EPAC investigations. Of those, there was a suggestion from the Ombudsman’s Office of a different outcome in 24 cases (6%) and a referral by the Ombudsman to the Office of the Children’s Guardian (because risk management by EPAC was considered inadequate) in 7 cases (2%). The NSW Ombudsman is currently overseeing over 60% of EPAC’s investigations.²⁴

From 1 July 2019, the reportable conduct scheme will be transferred from the Ombudsman’s Office to the Office of the Children’s Guardian (OCG).

Office of the Children’s Guardian

Where EPAC has made a finding of sexual misconduct towards a child or young person or a finding of serious physical assault of a child or young person, those findings are required to be reported to the OCG under the *Child Protection (Working with Children) Act 2012*. Such findings prompt the OCG to conduct a risk assessment of the person the subject of the finding. OCG will send EPAC a request for information. The OCG may request EPAC to

²³ EPAC submission, p12.

²⁴ EPAC submission, p22.

produce all its documentation on a PSOA, or may specify only a particular document, such as the investigation report.

At any stage of an EPAC investigation, if EPAC has concerns about a PSOA continuing to pose a risk to children, EPAC can proactively release information to the OCG pursuant to Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998*. This allows the OCG to conduct a risk assessment and, if appropriate, to cancel or bar the PSOA from contact with children, despite the absence of a notifiable finding. An example would be if EPAC has put someone on alternative duties or the NTBE list, and EPAC knows that the PSOA may also have another role involving children, for example, a football coach or private tutor, EPAC can release information to the OCG.

The Independent Commission Against Corruption (ICAC)

The Department must notify ICAC of any matter that concerns corrupt conduct.²⁵ ICAC may also make a direct referral to the Department for investigation. The ED of EPAC is the Department's Protected Interest Disclosures Manager.

New South Wales Education Standards Authority (NESA)

NESA may remove a person's accreditation to teach for misconduct. Information about teacher misconduct is provided to NESA by employers. EPAC decisions on misconduct are relevant to the NESA accreditation scheme.

EPAC notifies the Department's Probity Unit if a matter has implications for a teacher's accreditation (e.g. placement on the NTBE list and/or separation from the service). The Probity Unit records the outcome on HR records and notifies NESA. If NESA requires further and better particulars, they contact EPAC directly.

NESA has submitted that it receives timely notifications from the Department of teachers who have been placed on the NTBE list. However, NESA cannot consider the accreditation status of the teacher without more information about the reason for the teacher's suspension. During the course of an investigation, the teacher's NESA accreditation status may remain active and they can seek work with another employer. NESA sometimes requests further information from EPAC, however a number of factors may preclude information sharing during an investigation. For example, the investigation may not yet have commenced or the provision of information may prejudice an ongoing investigation.

NESA has stated that it would be helpful if reporting to NESA was incorporated into EPAC's procedures, including the establishment of regular meetings with EPAC officers to discuss mutually relevant issues.

²⁵ Section 11 of the Independent Commission Against Corruption Act 1988.

Policy framework

The over-arching conduct policy that applies to all employees of the Department is the Code of Conduct.

Other relevant policies and procedures can be divided into three broad categories:

1. Management of conduct and performance
 - Guidelines for the Management of Conduct and Performance
2. Child protection
 - Responding to Allegations Against Employees in the Area of Child Protection guidelines
 - Procedures for the local Management of Less Serious Allegations in the Area of Child Protection
3. Complaints Handling
 - Complaint handling policy
 - School community and consumer complaints procedures
 - Staff complaints procedure

Fair Warning, Fair Action (FWFA)

The FWFA policy is designed for Managers to manage low-level poor conduct that does not amount to misconduct, including breaches of the Code of Conduct. The Department's Fact Sheet on FWFA is an annexure to the Code of Conduct.

If an employee engages in behaviour that is disruptive to the effective functioning of the workplace, local Managers (Principals and DELs) can respond promptly by using a 'fair warning' approach to address the behaviour. Managers should initially counsel the employee. If the poor behaviour persists, they should meet with the employee and provide them with an opportunity to respond to the identified concerns. If necessary, the Manager may then provide a written direction to the employee. If poor behaviour occurs again, Managers have the authority to give the employee a second written direction not to engage in the conduct and a warning that repeated unacceptable behaviour may result in disciplinary action. If the misbehaviour occurs a third time, Managers have the authority to refer the matter to EPAC with a recommendation that action be taken.

The Review was reminded by stakeholders on a number of occasions that managers always have the power to issue directions for misbehaviour under s. 5 of the *Teaching Service Regulation 2017*.

Procedural guidelines

The *Guidelines for the Management of Conduct and Performance* are the “procedural guidelines” specified in the *Teaching Service Act* and the *Education (School Administrative and Support Staff) Act*. They commenced in August 2006. They have not been updated since, however the Review has had regard to a draft of updated procedural guidelines which are yet to be implemented. The guidelines relevant to child protection – *Responding to Allegations Against Employees in the Area of Child Protection* – were last updated in 2017.

The *Guidelines for the Management of Conduct and Performance* do not apply to persons who are employed on a probationary, temporary or casual basis. The child protection guidelines apply to all employees.

The Review considers whether there is scope for further updates to the *Guidelines for the Management of Conduct and Performance* before the document is implemented. These suggestions are discussed at Chapter 14 – Miscellaneous issues.

If there is any inconsistency between the *Guidelines for the Management of Conduct and Performance* and other policies or procedures, subject to the requirement that the protection of children is of paramount consideration, the *Guidelines for the Management of Conduct and Performance* prevail over other policies.

The guidelines relating to child protection adopt the same procedural requirements as defined in the *Guidelines for the Management of Conduct and Performance*. EPAC strives to adhere to the following procedural standards during the conduct of its investigations:

- Investigations are conducted by trained and impartial investigators
- The investigation is carried out in a confidential manner
- The absence or unavailability of the person who is the subject of the allegations will not preclude the investigation taking place
- Allegations will be put to the person who is the subject of the allegations
- The person the subject of the allegations will be given the opportunity to respond to the allegations
- Employees will be notified and formally advised about any interviews
- Interviews are conducted fairly and, where desired, in the presence of a support person
- The outcome of the investigation is based on a consideration of all the available evidence
- The person the subject of the allegation is advised of any proposed adverse finding and outcome and given the opportunity to make submissions to the decision maker.

CHAPTER 2

OUTLINE OF EPAC

History of EPAC

To understand EPAC today, it is helpful to provide a short account of its history.

Over the last two decades there have been a number of bodies investigating allegations of misconduct against employees of the Department. In 1996, during the Wood Royal Commission, the Department established the Case Management Unit (CMU) to investigate allegations against employees of improper conduct of a sexual nature towards children. Other allegations of inappropriate conduct towards children (physical and emotional abuse and neglect) were dealt with by the Industrial Relations Service (IRS). The IRS oversaw local investigations by principals and District Superintendents of non-sexual, child protection allegations.

In 1998, the *NSW Ombudsman Act 1974* was amended to require certain agencies, including the Department, to notify allegations of child abuse to the Ombudsman's Office and to report on the investigations taken and findings made in relation to those allegations.

In January 2000, the CMU amalgamated with the IRS to become the Child Protection Investigation Unit (CPIU), thereby coordinating the investigation of all allegations of inappropriate conduct towards children. The Unit subsequently became the Child Protection Investigation Directorate (CPID).

In June 2001, the then Ombudsman, handed down a report, "Investigating allegations of child abuse against employees – an investigation into the adequacy of investigations conducted by the Department of Education & Training." The report identified shortcomings in the Department's investigative procedures. Ombudsman staff went to the premises of the CPIU and IRS and took possession of a total of 261 investigation files. This represented a random sample of the total number of investigation files on hand. Generally, investigations were found to be of a poor standard. The Ombudsman's investigation found that there remained considerable room for further improvement in the Department's investigative practices including:

- Policies and procedures:
 - Had not been updated for some time to reflect changes in legislation;
 - Did not adequately reflect the complete spectrum of child abuse - i.e. did not clearly deal with allegations of child abuse made against teachers other than sexual allegations; and
 - Were not clear in relation to the requirements to report abuse.
- The training and expertise of investigators within the Department was limited with little attention paid to relevant child abuse investigation skills and knowledge
- There was little communication across the Department with respect to

- investigation techniques and for the conduct of disciplinary inquiries
- Risk assessment was case specific and based on limited assessment criteria
- Investigations suffered from:
 - poor planning
 - inappropriate interview techniques
 - lack of information provided to witnesses
 - poor or non-existent records of interview
 - inadequate witness statements
 - inappropriate interviewing of children
- Incomplete, invalid or inappropriate findings and recommended actions
- Interviews with the subject of the allegation(s) were inadequate and quite often not conducted at all
- Little understanding of child protection issues among investigators
- Poor documentation of investigations
- Notifiers of allegations of abuse made against colleagues were not afforded proper confidentiality and protection.

In 2002, a Director, with child protection experience, was appointed to head the CPID, which at that time had about 55 staff, of whom around 36 were investigators (which incidentally is about the same as the current number of investigators). Most of the investigators came from teaching backgrounds, though some had specialist investigative skills, having worked as police officers or Community Services case officers. The CPID also had a staff support function, providing counseling services to staff under investigation, as well as a legal officer and a senior review officer.

In 2003, the Staff Efficiency and Conduct Team (SECT), which investigates and monitors performance improvement programs, and prior to 2018 provided advice to Principals to assist them to deal with poor conduct by staff, joined the Directorate, which was renamed the Employee Performance and Conduct Directorate (EPAC).

In 2006, the team which investigated allegations of misconduct (not child protection), which was called the Serious Misconduct Investigation Team, was removed from the Department's Audit directorate (which dealt with corruption allegations) and merged with EPAC. The rationale for this move was that EPAC had better, established investigation systems.

In 2013, the Directorate was restructured to integrate the Serious Misconduct Investigation Team with child protection investigators, to form five investigation teams within EPAC.

In 2017, the Feedback and Complaints Team was added to EPAC as a part of a NSW Government-wide initiative to improve complaints handling. This team provides high-level support to Principals, school executives and DELs to respond to consumer complaints, and collects data about complaint handling and complaint issues.

In late 2017, EPAC received additional investigative resources, including a sixth team Director and 7 additional investigator positions were approved. The sixth team was created using existing staff, as the teams were reshuffled to ensure a mixture of skills and experience in each team.

Roles and functions

The current EPAC Strategic Plan was developed in June-July 2018. It provides that:

“Employee Performance and Conduct (EPAC) works to ensure that every student is known and cared for in our schools by implementing responsive and effective systems to investigate misconduct and take appropriate disciplinary action in response. EPAC also works to improve the quality of employees and services through analysing data from consumer complaints and working collaboratively to manage performance improvement programs.”²⁶

EPAC’s core business is:

- To provide advice about child protection allegations against employees, misconduct matters, issues of poor performance, and complaints management including FWFA
- To conduct investigations of allegations of misconduct against employees
- To oversight employee Improvement Programs
- To undertake disciplinary and remedial action
- To manage Public Interest Disclosures
- To undertake required external reporting to ICAC and NSW Ombudsman and OCG.²⁷

Structure

EPAC’s core business (including SECT, FACT and all the investigation teams) is supported by 12 teams with 94 full time equivalent roles, headed by the Executive Director. The Executive Director reports directly to the Deputy Secretary, Corporate Services (currently Mr Peter Riordan PSM).

EPAC’s submission to the Review included an organisational chart which shows that below the Executive Director in EPAC are the following:

- 6 investigation teams (5 being Child Protection Investigations and one being Investigations) each comprising:
 - 1x Director
 - 2x Principal Investigators
 - 4x Investigators
- 1 Director of SECT and 13 staff
- 1 Director of Systems and Practice and 1 principal project officer
- 1 principal legal officer and two staff
- 1 manager of support services and 9 staff

²⁶ EPAC submission, p37.

²⁷ EPAC presentation, *Navigating the Maze*.

- 1 Director of FACTS and 5 staff
- A Preliminary Investigation Team (**PIT**) consisting of 7x investigators

However, the organisation chart does not reflect the true, present state within EPAC, as there have always been a considerable number of vacant positions. The resourcing of EPAC is dealt with in chapter 5 – Resourcing of EPAC.

Investigators

Investigators come from a variety of backgrounds, including:

- Solicitors from government and the private sector
- Senior investigators in other jurisdictions
- Former police officers, including detectives
- Police prosecutors
- Officers from the Ombudsman’s office and the OCG
- Social workers
- Community services case workers
- Senior child protection practitioners.²⁸

Investigators are at the grade of Clerk 7/8 Principal investigators are at the grade of Clerk 11/12. There is one Principal Investigator at the grade of Clerk 9/10 in EPAC. The grade structure of EPAC is discussed in Chapter 5 – Resourcing of EPAC. A training and induction program is provided to new investigators. The professional development and training of investigators is discussed in Chapter 13.

The Review was informed by EPAC that a few of its investigators have had schools-based experience, albeit many years ago. One of the issues raised by stakeholders was the desirability for investigators to understand the school context in fulfilling their role. The Review deals with this issue in Chapter 5 – Resourcing of EPAC.

Preliminary Intake Team (PIT)

EPAC receives reports of misconduct from Principals, school executives, DELs, other workplace managers, teachers and to a lesser extent from students, parents and members of the community.

The Review was told by EPAC that a review in 2018 of all Enquiry matters (explained below) indicated that significant time and resources were spent by staff in receiving and processing calls from Principals that related to low level misconduct and complaint handling. This was having an impact on the time available to investigators to conduct and complete their investigations.

²⁸ EPAC submission, p8.

As a consequence, the PIT was established in the last quarter of 2018, staffed by 7 investigators drawn from EPAC's existing staff. The PIT officers receive reports of and enquiries about alleged misconduct, and they undertake sufficient preliminary investigation to establish whether a matter reaches the threshold for disciplinary investigation. The bulk of EPAC's advising work regarding low-level conduct matters is now handled by the PIT. It also conducts triage of matters to establish whether there needs to be risk management action, such as placing a PSOA on alternative duties or issuing a formal direction to an employee.

The PIT is headed by a Director who presently also heads an investigation team. There is also a Duty Principal Investigator (DPI) drawn on a rotational basis from the investigation teams. The PIT is staffed by both full-time officers assigned to PIT and others on a rotational basis from the investigation teams. The Duty Director (drawn from the 6 Directors of the investigations teams on a rotational basis) has a role in allocating matters for investigation, local management or Enquiry after the PIT has done its triage. This is explored further in Chapter 6 – Intake of allegations.

The implementation of the PIT also saw the introduction of a number of resources and tools to assist EPAC in the delivery of its core business. These include:

- An online reporting form
- Decision trees to assist school-based complainants to identify what should be reported to EPAC and what should be dealt with in the workplace
- A preliminary assessment template (the "PIT form") to ensure a level of consistency of information gathered and analysis of matters by PIT officers
- Resources for school-based managers to assist in the management of low-level conduct matters.

The introduction of the PIT has been received well by complainants, employees and other stakeholders. However there remain opportunities for improvement, which are dealt with in Chapter 4 – Resourcing of EPAC and Chapter 6 – Intake of allegations.

Course of investigations

After the receipt of an allegation by the PIT, the following actions occur:

- Investigation: when the matter reaches the threshold of potential misconduct.
- Local management: referring allegations of lower-level misconduct back for local investigation by Principals, DELs or other officers under the supervision of EPAC. EPAC still makes any findings and determinations.
- Enquiry: where the matter does not reach the threshold for misconduct, EPAC provides advice to managers about how to address low-level behavioural issues.
- Issuing a letter of warning under the relevant guidelines for allegations of misconduct that do not require investigation (known as GS10).

Staff Efficiency and Conduct Team (SECT)

SECT provides guidance and support to Principals and Managers in relation to teacher performance issues and improvement programs. The team comprises a Director, two Senior Employee Performance Officers, five Employee Performance Officers and an administration officer. The Director has delegated authority to make disciplinary decisions in relation to performance.²⁹ Separate processes and procedures apply to the management of performance that are not a part of this Review.

In the past, SECT assisted Principals with low-level misconduct by employees. In mid-2017, these duties were transferred to the 6 investigation teams. This was done to better integrate advice provided to school managers. The SECT role is now exclusively focused on managing performance.

There is some cross over of matters between SECT and the Investigations teams. However, the issues being addressed by each team are often quite different. For example, some employees are simultaneously subject to both misconduct allegations and performance issues. In these circumstances the relevant Investigator and SECT officer communicate to ensure appropriate coordination of approach and outcomes.

SECT is also responsible for oversight of the Teacher Performance Management and Improvement project (TPMI project). The TPMI project consists of teams of senior employees with relevant educational and management experience to provide “shoulder-to-shoulder” support to Principals in managing teacher performance. The TPMI project is not part of this Review.

Some views were expressed in submissions from stakeholders about the proper organisational location for SECT, now that its low-level misconduct work has been transferred to the investigation teams. This is dealt with in Chapter 12 – The other functions of EPAC: SECT, FACT and CHIP. A further concern that has been raised is that investigation teams are spending a considerable amount of time dealing with low-level misconduct matters, whereas resources ought to be focused on the more serious allegations of misconduct. This is dealt with in Chapter 8 – Local management of low-level misbehaviour.

Feedback and complaints team (FACT)

The FACT was established in October 2017 to support the Complaint Handling Improvement Program (CHIP). This program aims to improve how government responds to and manages consumer complaints.³⁰

FACT currently receives consumer complaints from a variety of sources, including the Department’s ‘widget’ on its website. The FACT refers the complaints to the relevant section

²⁹ EPAC submission, p39.

³⁰ EPAC submission, p40.

or individual in the Department, but does not deal with the complaint itself. FACT also collects data regarding consumer complaints. The FACT does not deal with staff complaints, which are dealt with by Principals, DELs or school Managers.

The view has been expressed that the FACT has little relevance to EPAC's core business and that a more appropriate location for the FACT may be in another location of the Department. This matter is further discussed in Chapter 12 – The other functions of EPAC: SECT, FACT and CHIP.

EPAC Legal Officers

EPAC has its own legal officers, separate from the Department's Legal Services Directorate. EPACs two Legal Officers and the Legal Support Officer provide legal advice to the EPAC ED and to investigators. They also work on preparing EPACs IRC matters. EPAC staff are able to seek legal advice from the Principal Legal Officer, however all requests for advice must be in writing, and generally take some time to be processed.

It was suggested to the Review by some former and current EPAC employees that the Legal Officers would be more appropriately placed in the Department's Legal Services Directorate. We consider there is merit in the Directorate maintaining its own legal officers, separate from the Department's Legal Services Directorate. This provides the staff of EPAC with ready access to legal advice. In addition, later in this report we make recommendations that, if accepted and implemented, will involve the further input by the legal officers of EPAC.

Delegations

In 2017, the Directors of the 6 EPAC investigation teams were given the delegation to take any remedial action for low-level misconduct. Directors do not make decisions on investigations that have been conducted by their team members, so that there is a degree of independence between those who conduct the investigation and those who make the final decision on remedial action.

EPAC team Directors may decide to discontinue an investigation being managed within their team if they believe that there is no prospect of coming to a finding. This is discussed further in Chapter 6 – Intake of allegations.

CHAPTER 3

EPAC'S RECORD

Total matters referred to EPAC in 2011-2018

There has been a steady and substantial increase in matters reported to EPAC since 2015.³¹ The table below shows that between 2011 and 2018 the number of EPAC investigations has increased by 63%. In particular, the largest increase (360%) has been in Enquiry matters – that is, matters that did not reach the threshold of misconduct and so were remitted back to local managers. These matters, involving the lowest level of misconduct, take up a considerable amount of time of investigators, particularly in the PIT. In 2018 only 26% of matters warranted EPAC involvement by either investigation or supervision of locally managed investigations. The remainder were Enquiry matters that EPAC received but did not take to investigation or local management.

	Enquiry	Local management	Investigation	Total
2011	776	364	436	1576
2012	716	343	422	1481
2013	772	384	641	1797
2014	914	352	504	1770
2015	1572	289	466	2327
2016	2146	391	652	3189
2017	2320	352	777	3449
2018	2805	278	711	3794

There are a number of factors that have likely contributed to the increase in matters reported to EPAC. These are:

- The Local Schools, Local Decisions initiative
- A change in the role of Directors Educational Leadership
- The Royal Commission into Institutional Responses to Child Sexual Abuse
- The Fair Warning, Fair Action policy.

These are considered below.

Local Schools, Local Decisions

The “Local Schools, Local Decisions” initiative was launched in March 2012. It gives Principals and their school communities a greater say over how they allocate and use their available resources to best meet the needs of their students.³² This means that Principals

³¹ EPAC submission, p6.

³² <https://education.nsw.gov.au/our-priorities/work-more-effectively/local-schools-local-decisions/the-reform>

are more responsible for financial management, procurement and recruitment. It has had the effect of increasing possible opportunities for fraud and conflicts of interest in schools.³³

Directors Education Leadership (DELs)

At about the same time as the implementation of *Local Schools Local Decisions* there was a change in the roles of Directors Educational Leadership (DELs). DELs now provide shoulder-to-shoulder support for Principals, as opposed to having a clear line management role. It is possible that this caused Principals to report directly to EPAC rather than first seeking the advice of their DEL.

The current school management structure in the Department is as follows:

- The Principal is the manager of a school.
- The line manager of a school Principal is a DEL. There are 110 DELs across NSW and on average each one looks after about 20 schools.
- The line manager of a DEL is an Executive Director, School Performance (ED School Performance). There are six EDs School Performance.
- The schools, the DELs and the EDs School Performance all come within the Department's School Operations & Performance Division (SO&P). The head of SO& P is a Deputy Secretary (currently Mr Murat Dizdar PSM)

Royal Commission into Institutional Responses to Child Sexual Abuse

The work of the Royal Commission, established in 2013, has likely contributed to an increase in reporting by teachers and Principals. The 2017-2018 annual report of the NSW Ombudsman reported that in the 2016-2017 period in the education sector in NSW there was a 63% increase in notifications of reportable conduct from the previous year and that in 2017-2018 there was a further 41% increase.³⁴

Fair Warning, Fair Action (FWFA)

The FWFA policy was implemented in 2014. After a Principal has issued three directions to a teacher for a pattern of poor conduct, they are required to report the teacher to EPAC, which then investigates and takes appropriate disciplinary or remedial action. EPAC has submitted that many Principals have been under the misapprehension that this would mean that poorly behaved staff would be dismissed after repeated misbehaviour, even at a low level. In fact, because the misconduct is low level, few dismissals have resulted.

³³ See the submission by New Law Pty Ltd at p4.

³⁴ EPAC submission, p7.

Total matters closed

During 2016 and 2017 there was a growing backlog of active investigations.

In late 2017 and 2018 there was an increase in the EPAC budget to deal with the huge backlog of cases. Staff levels were increased and contractors were hired to assist to reduce the backlog. In 2018, staff focussed on closures of seriously old matters and increased the numbers of closures. The aim was to reduce overall caseloads of investigators so that a benchmark could be reached that 80% of investigations would be completed within 12 months of receipt of complaint. Despite the increased staffing and a reduction in the backlog, this benchmark has not been reached. EPAC says it is aiming to achieve an 80% closure rate within 12 months by the end of the 2019 school year. The Review indicates that this is highly unlikely in the absence of any significant changes.

The figures in this table demonstrate the increase in closures in 2018 compared to previous years.

Year	Received	Closed
2011	436	403
2012	422	449
2013	641	442
2014	504	510
2015	466	475
2016	652	410
2017	777	557
2018	708	1121

Despite the supplementation of EPAC's budget to deal with the huge backlog, EPAC's record of closing matters during the period 2018-2019 was as follows:

In the 12-month period between 7 June 2018 and 6 June 2019, EPAC closed:

- 965 investigations:
 - 368 of those 965 matters (38%) were closed within six months.
 - 508 of those 965 matters (53%) were closed within nine months.

In other words, during the last 12 months, 47% of matters have not been closed within nine months. In our view, this is a highly undesirable situation which demonstrates that even now EPAC is severely under-resourced.

Timeliness

A recurrent theme in submissions received from both stakeholders and individuals was that EPAC takes far too long to finalise matters. The Review looked very closely at the issue of timeliness. The table below shows the percentage of investigations since 2011 that were

completed or closed in less than 12 months. The table below shows how the increase in reports of misconduct from 2015 has resulted in a drop in the percentage of cases completed within 12 months that has persisted until today.

Year	% of investigations closed in less than 12 months
2011	86%
2012	86%
2013	88%
2014	81%
2015	69%
2016	68%
2017	64%
2018	62%
2019 (as at 28 March 2019)	73%

Outcomes of investigations

The two tables below show how matters were disposed of in the two-year period 2017-2018. The first table is for teachers and administrative staff, and the second table is for Principals. The first table shows that of 1513 matters involving teachers and administrative staff who were investigated by EPAC in the two-year period of 2017-2018, only 193 (13%) received career defining outcomes (resignation, demotion, direction to resign, dismissal, withdrawal of casual approval, contract terminated). Putting it another way, 87% of the matters that were investigated by EPAC resulted in only remedial action, a fine, or a caution/reprimand. The second table, relating to Principals, shows that during the same period of the 162 matters disposed of, only 15 (24%) resulted in career defining outcomes (resignation, demotion, direction to resign, dismissal, withdrawal of casual approval). In other words, 76% of investigations of misconduct by Principals resulted in remedial action.

We considered what these figures are saying about the nature of EPAC's work. The question that arises is whether these figures indicate that EPAC is investigating too many low-level conduct matters that result in low-level responses. This, and other similar issues, are considered in later chapters.

Closed matters (not involving principals) 1 January 2017 - 31 December 2018				
	All staff	Teachers		Non-teaching staff
		Permanent	Casual	
Allowed to resign	28	20	1	7
Case withdrawn	1	0	0	1
Caution	3	1	0	2
Caution and reprimand	192	157	9	26
Closed - no disciplinary/remedial action	593	331	84	178
Contract terminated	14	0	3	11
Demote	9	7	0	2
Directed to resign	23	16	0	7
Dismissal	31	21	0	10
Fine	14	10	0	4
Remedial/conditional casual approval	35	7	24	4
Remedial/other	478	226	127	125
Reprimand	3	3	0	0
Transfer	1	0	0	1
Withdraw casual approval	88	8	38	42
TOTAL	1513	807	286	420

Closed matters involving principals 1 January 2017 - 31 December 2018	
TOTAL	162
Allowed to resign	6
Caution and reprimand	21
Closed - no disciplinary/remedial action	81
Demote	5
Directed to resign	2
Dismissal	1
Fine	4
Remedial/counselling	3
Remedial/letter of direction	3
Remedial/monitoring	1
Remedial/other	5
Remedial/training and development	3
Remedial/warning	26
Withdraw Casual approval	1

Identity of PSOAs

The Review was provided with EPAC statistics to demonstrate the type of employees investigated by EPAC. Of matters investigated in 2018:

- 38% concerned permanent teachers
- 18% concerned casual/temporary teachers
- 10% concerned School Executives
- 10% concerned Principals
- 8% concerned permanent SASS
- 7% concerned contractors (including volunteers and practical students)
- 5% concerned public servants
- 4% concerned temporary SASS

Some submissions we received from Principals' Associations suggested that Principals are treated more harshly than other Departmental employees. Those perceptions are not borne out by the statistics provided to us, that demonstrate that a similar percentage of complaints against Principals were dealt with by remedial action, caution or reprimand. As at 29 May 2019, there were only 4 Principals who had been directed to alternative duties. This is discussed further in chapter 9.

Interim measures

We looked at the imposition of interim measures for child protection pending the outcome of an investigation, such as placing a permanent employee on alternative duties or placing a temporary employee on the NTBE list. The table below shows that as at 13 May 2019 only 14% of teachers, administrative staff, miscellaneous staff, contractors and volunteers under investigation are currently suspended, on leave or on alternative duties.

Total active matters as at 13 May 2019 (not involving principals)	
Contractors/cleaners	36
Education (School Administration & Support Staff)	91
Other	3
Public Servant	18
Teacher	333
Volunteer	5
TOTAL	486
NTBE	58
Alternative duties	39
Suspended without pay	10
Suspended with pay	2
On leave	17
TOTAL	68

As at 13 May 2019, 22% of permanent teachers under investigation are currently suspended, on leave or on alternative duties.

Active matters involving teachers as at 13 May 2019			
	All teachers	Permanent	Casual
Central	6	6	0
Non-school based	4	4	0
Primary school	112	90	22
School Counsellor	5	5	0
Secondary	196	146	50
School for Specific Purposes	10	9	1
TOTAL	333	260	73
NTBE	28	5	23
Alternative duties	34	34	N/A
Suspended without pay	9	9	N/A
Suspended with pay	1	1	N/A
On leave	12	12	N/A
TOTAL	56	56	N/A

Previous audits and enquiries

The *NSW Ombudsman Inquiry into behaviour management in schools* (August 2017) resulted in an audit during 2016 of EPAC matters involving students with disabilities. EPAC's handling of 14 of the 147 matters reviewed in the audit were determined to be unsatisfactory. The report found that because of the significant volume of matters being handled by EPAC, the audit demonstrated that EPAC was performing well in identifying matters that should be notified to the Ombudsman and that EPAC appeared to be making sound decisions about which matters should be managed at the local level.³⁵

The Ombudsman's audit also identified the need for EPAC investigators to record the reasons for their decision-making more clearly and consistently. The Ombudsman identified a number of instances where the rationale for a determination was not supported by the evidence or relevant legislation. The Ombudsman commented that it was important that the reasons why a matter does or does not meet the threshold for reporting to the Ombudsman or the threshold for investigation by the Department under the *class or kind* determination, should be more clearly understood by investigators and articulated in their reports. The Ombudsman's views on these issues were accepted by EPAC.

The *Parliamentary Inquiry into the Education of Students with Disability or Special Needs in NSW* (September 2017) and the submission made to the Inquiry by John Hatton AO MP were brought to our attention. The Parliamentary Report made some recommendations to

³⁵ The NSW Ombudsman Inquiry into behaviour management in schools (August 2017), p.72-73.

EPAC, including that it develop policy documents outlining the procedures for complaints regarding allegations of misconduct or reportable conduct, and to set clear guidelines and expectations for the benefit of external complainants.

This Review has closely examined EPAC's policy documents, and in particular its procedural guidelines and we make suggestions for improvement so as to guide EPAC decision makers and investigators, complainants and PSOs (see Chapter 14 – Miscellaneous issues).

Public Service Association (PSA) survey

In March 2019, the PSA conducted a survey of attitudes towards EPAC amongst both EPAC and non-EPAC employees to assist in preparing its submission to this Review. EPAC employees identified the following concerns:

- Inadequate resourcing to undertake the work of EPAC, including within the PIT, leading to unacceptable delays in completion of investigations
- High staff turnover
- The Directorate is top heavy
- The Feedback and Complaints Team needs to be separated from EPAC
- No guidelines to determine what non-child protection matters are investigated
- No training for investigators
- Little or no constructive Directorate-wide discussion about practices
- No guidelines on which to base decisions other than [inadequate] definitions of reportable conduct
- Decisions about changes to practice are made in an ad-hoc manner and are poorly communicated
- Low level misconduct matters should be managed locally
- Decision making is not consistent.³⁶

New South Wales Secondary Principals' Council (NSWSPC) survey

In 2017 the NSWSPC conducted a survey of its members' attitudes to EPAC. The results indicated that EPAC's communication was poor, deadlines were often ignored, and schools were often left to manage staff performance issues for over 12 months before a determination was made. The NSWSPC has submitted, inter alia, that the management of active investigations must be revised to include regular updates for Principals of schools where teachers have been removed pending the outcome of an investigation.

³⁶ PSA Survey of EPAC Members and Staff, March 2019.

Overview of complaints

Based on submissions received and on interviews held, we perceive that the main issues that are causing concern among both organisational stakeholders of EPAC and individuals affected by EPAC's decisions, as well as by former and current employees of EPAC, include:

- EPAC is seriously under-resourced
- PSOAs are left for long periods of time not knowing the specifics of allegations against them
- PSOAs are left for long periods of time before a decision is made
- Inconsistent decisions about interim protection measures
- Investigators are not necessarily speaking with witnesses nominated by the PSOAs during investigations
- Poorly drafted allegations of misconduct
- Lack of transparency as to how decisions are made and a lack of benchmarking in decision making
- Vague definition of misconduct and inconsistent applications of the term
- Decision making by a single person not subject to internal consultation or review
- Poor communication between EPAC and PSOAs, Principals and alleged victims
- Investigators have little or no experience of the context of school life in the real world.
- Principals do not feel supported by EPAC

There is no doubt that EPAC has done a lot of good work over many years. Some submissions to the Review were complimentary about EPAC and the way that it has dealt with a most difficult task. The main advantage of an investigative body like EPAC is that allegations of misconduct are rigorously assessed by a body with experienced investigators, and which is within the Department and yet independent of line managers. EPAC is seen by most stakeholders as independent and thorough in its assessment of allegations. Former and current employees of EPAC have said that the quality of the work they perform in EPAC is excellent, varied and challenging, and, most importantly, that it contributes significantly to the safety, welfare and wellbeing of children in New South Wales and maintains confidence in our education system.

There are, however, some serious shortcomings in the structure, processes, procedures, resourcing and management of EPAC that can relatively easily be rectified.

CHAPTER 4

OVERSEAS COMPARISONS

In various parts of this Report, we have made comparisons with other agencies in NSW and those equivalent units that operate in other States of Australia. We have also informed ourselves about the teacher misconduct investigation schemes in the United Kingdom and British Columbia. It should be borne in mind that no system, domestic or international, is entirely comparable with our own. We set out hereunder our review of those two overseas jurisdictions and our observations.

UNITED KINGDOM

In the UK, the regulatory system relating to teacher misconduct is operated by the Teaching Regulation Agency (TRA), an executive agency of the Department for Education, which acts on behalf of the Secretary of State.

The *Teacher Misconduct: disciplinary procedures for the teaching profession*³⁷ sets out the procedures that apply to an investigation conducted by the TRA (Disciplinary Procedures).

The TRA receives referrals from employers, the public, the police, the Disclosure and Barring Service, and other interested organisations, or other regulators.

On receipt of a case the TRA will check:

- that it relates to a teacher in England, and
- that it is a case of serious misconduct.

Investigation stage

First stage: Normally within 3 working days of receipt of a case, the TRA completes an initial assessment to determine whether a case is serious enough to potentially result in a prohibition order and the referrer is notified.

TRA considers whether the teacher:

- may be guilty of unacceptable professional conduct;
- may be guilty of conduct that may bring the profession into disrepute;
- may have been convicted, at any time, of a relevant offence; and
- whether a prohibition order may be appropriate.

If it is decided not to undertake an investigation, the referrer and teacher are informed and

³⁷ <https://www.gov.uk/government/publications/teacher-misconduct-disciplinary-procedures>.

no further action is taken. Otherwise, it will proceed to investigation or further information will be requested.

Second stage: Normally within 3 working days of receipt of the case, the TRA considers whether an Interim Prohibition Order (IPO) should be considered to prevent the person teaching until the case is concluded. An IPO can be applied at any stage once the seriousness of the facts of the allegations have been established, without the need for a formal conduct hearing. The teacher is given 7 days' notice to provide any additional evidence when they are informed that consideration is being given to the application of an IPO.

Within 5 working days of any evidence received from the teacher, or 7-day time limit, all evidence is reviewed and a recommendation made to the TRA decision maker on behalf of the Secretary of State.

Within 2 working days, if a decision is made to make an IPO the teacher and employer are informed and the name added to the prohibited list. Where the teacher makes an application to the TRA, the IPO will be reviewed within 6 months of the date it was made and subsequently at six monthly intervals.

Third stage: The TRA carries out a formal investigation. As soon as the TRA has decided that an allegation should be investigated, it will send an initial letter to the teacher. The initial letter will:

- set out the allegation(s) referred to the Secretary of State, enclosing copies of relevant documentation, including details of any relevant criminal convictions obtained from a relevant police force
- invite the teacher to make written representations regarding the allegation, normally within four weeks from receipt of the initial letter, and to provide any other relevant evidence which the teacher wishes; and
- provide access to a copy of the Disciplinary Procedures.

The TRA will send a copy of the initial letter to the employer or member of the public who made the referral.

The TRA considers the evidence, seeking advice from experts when needed, including from teaching, medical, legal professions and decides whether to proceed to a hearing. A further document, *Teacher misconduct: the prohibition of teachers*, informs the TRA's decision making.

As a result of its investigation the TRA will decide:

- that there is no case for the teacher to answer; or
- that there is a case to answer and to refer the case to a professional conduct panel.

The TRA will inform the teacher and referrer in writing of the decision within two weeks.

Hearing and Decision

Where a case is referred to a professional conduct panel, the teacher and referrer are informed and invited to give a written response within two weeks of the decision letter identifying whether they admit the alleged facts and, if so, whether they accept that it amounts to unacceptable professional conduct, conduct that may bring the profession into disrepute or conviction, at any time, of a relevant offence.

If the teacher admits the matters, then they may request that the allegation be considered without a hearing. In this case, the presenting officer will contact the teacher or the teacher's representative and seek to agree a statement of facts. The teacher or the teacher's representative will have three weeks to respond to the request from the presenting officer and, in addition to the agreed statement of facts, to provide:

- any information they wish to make about the case, including mitigating factors; and
- the reasons why they consider the case should be considered without a hearing.

Based on the available evidence and information submitted, the TRA will decide whether the allegation may be considered without a hearing. In reaching this decision, it will take into account:

- the interests of justice; and
- the public interest.

Where the TRA decides the allegation may be considered without a hearing, the allegation will be considered in a meeting of a professional conduct panel.

The TRA will inform the teacher and the presenting officer in writing of the decision and details of the panel membership and meeting date. The TRA will provide information about the decision and the meeting date to the teacher's employer.

The TRA will send a copy of the agreed statement of facts and any representations made by or on behalf of the teacher and by the presenting officer to the panel members, prior to the meeting.

The professional conduct panel meets to decide the case. The procedure at the meeting is determined by the chair. The panel consists of at least 3 members, all of whom are recruited through a public appointment process. One panel member is a teacher; one panel member is someone who has never worked as a teacher; and one panel member may be a former teacher. The TRA makes a legal adviser available to the panel.

The case will be considered at a hearing if the teacher does not respond to the decision letter or does not do all of the following:

- request that the allegation be considered without a hearing; and
- admit the matters specified; and
- agree a statement of facts.

A panel (usually 3 members made up of professional and lay members) hears evidence (from teachers and witnesses) and the panel decides whether facts have been proven and, if so, whether to recommend to the Secretary of State that a prohibition order would be appropriate or not.

Where the Secretary of State decides not to prohibit the teacher, the teacher and referrer are informed in writing and this is published on the Gov.uk website. No further action is taken.

Where the Secretary of State decides to prohibit, the teacher, referrer and teacher's current (and if necessary former) employer are informed in writing and the decision is published on the Gov.uk website. The teacher is added to the prohibited list.

BRITISH COLUMBIA

In British Columbia, it is the Commissioner for Teacher Regulation who reviews reports and complaints about the conduct or competence of educators and decides which process is appropriate to address a complaint or report.

Take no further action

The Commissioner may decide to take no further action, for example:

- If a complaint was made in bad faith
- If a complaint was made for an improper purpose
- If a complaint was not made in a timely manner
- If there is no reasonable prospect that the matter will result in an adverse finding
- If it is not in the public interest to take further action.

If the Commissioner decides to take no further action, the reasons for that decision will be provided to the person making the complaint and to the teacher.

Defer action

The Commissioner may decide to defer taking action until another process addressing the same issue or concern is concluded by a school district, independent school authority, or criminal proceeding.

Decide for a consent resolution

The Commissioner and the teacher involved in a disciplinary matter suggest that a matter be resolved in a consent resolution (discussed below) prior to a citation (discussed below) being issued.

Initiate an investigation

An investigator is assigned to gather information related to the complaint or report. An investigation may lead to a citation or a hearing.

The Commissioner will let the teacher and the person who made a report or complaint know the outcome of their preliminary review. If the outcome is the initiation of an investigation, then the school district or independent school authority who employs the teacher will also be notified.

Investigation

An investigation is started if the Commissioner thinks more information is required to make a decision. This process is an objective, non-adversarial, information-collecting process so that the Commissioner can make a fair and well-informed decision. An investigator gathers documents, conducts interviews and writes an investigation report.

At the start of the investigation:

- The person who made the complaint, the teacher and any school district or independent school authority that employs the teacher are notified
- A copy of the complaint is provided to the teacher
- An investigator may contact the person who made the complaint, the teacher and anyone else who may have relevant information.

During the investigation, the Commissioner may consider any previous decisions not to take further actions, previous investigations, previous consent resolution agreements, including any findings and/or disciplinary actions taken under the *Teaching Profession Act* concerning the certificate holder under investigation.

Anyone involved in the investigation may be required to give evidence or provide documentation or other items that could be relevant to the case. If necessary, the Commissioner can apply for a court order for someone to comply with this requirement.

The Commissioner (or delegate) has the authority to:

- Enter the building of a public or independent school, any buildings used in connection with the school, or any offices of a board of education or independent school authority
- Inspect any record of a board of education or of an independent school authority
- Interview any employee of a board of education or independent school authority, the authorized person who is the subject of the investigation, the person who sent the report or complaint and any other person the Commissioner considers may have relevant information.

Following an investigation, the Commissioner can decide to:

- Take no further action, providing reasons to the person who made the complaint or report, the certificate holder, and the school district or independent school authority employer
- Make or accept a proposal for a consent resolution
- Issue a citation for a hearing

- Order a further investigation.

If there is a serious risk to the health or safety of students, the Commissioner may order a teacher's certificate be suspended until the final outcome is determined by hearing or consent resolution.

Consent resolution agreement

Both the Commissioner and the teacher involved in a disciplinary matter have the opportunity to suggest that a matter be resolved in a consent resolution to avoid a citation and hearing.

This voluntary process results in a written agreement that includes information about what was decided and how it relates to a teacher's certificate and/or practice. The outcome is shared with the person who made the complaint and the consent resolution agreement is made public unless it would cause hardship to the person who was harmed by the teacher. If the outcome is the suspension or cancellation of certificate, the information is recorded in the online registry and on the discipline outcomes page.

Citation for a hearing

A citation is a public document issued by the Commissioner for Teacher Regulation. It lists the allegations against the teacher that will be the subject of a public hearing. Allegations in a citation are unproven until the hearing panel has reached a final decision.

If a citation is issued:

- The person who made the complaint is notified
- The date, time and place of the public hearing are posted online.

Public hearing

A public hearing is similar to a court proceeding. It's an opportunity for a hearing panel to hear evidence and testimony relevant to the allegations set out against a teacher.

Hearing and panel decisions are open to the public unless that would cause a significant hardship to a person who was harmed by the teacher.

How hearing panels are appointed

The outcome of a hearing is determined by a hearing panel. The Commissioner pulls panellists from the Disciplinary and Professional Conduct Board and may also appoint members of the public to sit on hearing panels as appropriate.

Discipline Outcomes

Discipline outcomes are available online to provide confidence that educators who fail to meet the standards are held accountable. In some cases, outcomes are not published if it would cause hardship to a person who was harmed. A searchable discipline database can be found on the website.³⁸

³⁸ <https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/boards-commissions-tribunals/commissioner-for-teacher-regulation/discipline-outcomes-statistics>

OBSERVATIONS

In both the UK and British Columbia there is a combination of both internal departmental decision-making and external decision-making by a tribunal. However, what is abundantly clear is that the UK system moves much more quickly than EPAC, measuring most steps in days or weeks rather than in months. It is also apparent that the UK system provides far more information to the PSOA at a much earlier stage than in our system. The UK system also recognises the impact of interim risk management measures by insisting on the PSOA having a right to be heard before those measures are adopted. Significantly, both of the overseas systems make use of diverse panels for decision-making. It is also significant that in British Columbia there is extensive reporting of outcomes in disciplinary proceedings for teachers. In their system, it would appear that there is no anonymising, however we are of the view that any public dissemination of outcomes in New South Wales should be anonymized.

We are of the view that an examination of these two overseas systems demonstrates the importance and value of:

- timeliness of investigations
- early service of allegations on the PSOA
- a right to be heard prior to interim risk management measures involving removal from the workplace
- the benefits of an internal panel for decision-making
- wide anonymised reporting of outcomes in disciplinary proceedings.

CHAPTER 5

RESOURCING OF EPAC

EPAC staff resources

The single most pressing concern expressed in almost every submission received by the Review, including EPAC itself, is that the Directorate is inadequately resourced to undertake the work required of it in a timely and proficient manner. This has had, and continues to have, a deleterious effect on EPAC staff, who are doing a most important and difficult job under trying circumstances. Our observations are that EPAC staff are concerned about the quality and timeliness of outcomes and that they would welcome changes that may increase stakeholder perceptions of timeliness, consistency, procedural fairness and the professionalism of their work.

Examples of submissions about the insufficiency of resources include:

The PSA: “Staffing should be substantially increased across the Pre-Investigation team, the SEC team, the feedback and complaints team and other Investigation teams to enable cases to be dealt with in a more timely manner”.

New Law Pty Ltd: “It is clear that EPAC was simply under-staffed for a considerable period of time and unable to properly perform the tasks allocated to it.”

SO&P: “If it is the case that EPAC has insufficient resources to effectively manage current cases with respect to misconduct, there is an imperative to properly resource this part of EPAC.”

A former EPAC employee: “During my time at EPAC, I held a case load of 30-40 matters on average (which included a mix of investigations and ‘local managements’). With approximately only one hour available per week to dedicate to each matter my personal ability to prioritise and deal with dissatisfied stakeholders does not excuse the fundamental lack of resourcing and the huge delays in progressing and finalising investigations (which more often than not took over 12 months from start to completion). I could see the impact that these delays had on all relevant stakeholders. Principals were completely disarmed during the process and lacked certainty in terms of likely outcomes, which impacted their ability to plan staffing requirements and to be seen as effective leaders in their school community. Victims and their parents felt that their matters were not given due consideration or treated with appropriate concern. The staff members who were the subject of the allegations suffered from uncertainty, and this led to an inordinate amount of Work Health and Safety claims being lodged by staff members for stress and anxiety relating to investigations. This undoubtedly cost the Department an incomprehensible amount per year in workers’ insurance premiums.”

The PSA said that staff turnover within EPAC has also been an issue. As cases are handed

over to other investigators, there are inevitably delays in the transition of the file and there are often delays associated with the recruitment and induction of new staff. EPAC confirmed that a significant number of investigations have had to be re-allocated, due to investigators moving to new positions or transferring to other agencies or going on maternity or extended leave. The transfer of investigators to the PIT when it was initiated in 2018 also meant that the outstanding investigations of those persons had to be re-allocated. Re-allocation often results in unacceptable delay. In July/August 2019, it is anticipated that further matters will need to be reallocated with 3 Principal Investigators due to commence maternity leave.

We have been informed by current and former employees of EPAC that under-resourcing has an effect on staff morale and contributes to the turnover of staff and loss of corporate experience. For example, the Review received a submission that “Staff appear stressed and are in a constant struggle to manage the sheer number of matters coming in. Morale is suffering as a result.”

EPAC admit that staff were stressed in 2016/2017 due to their excessive workloads and the impact of the NSW Upper House *Inquiry into Children with Disability in Schools* and the *Royal Commission into Institutional Responses to Child Sexual Abuse*. The Upper House Inquiry meant an increase in low-level child protection matters being referred to EPAC and a request from the NSW Ombudsman for additional notifications involving children with disability. Some of these matters would previously have been caught by the Department’s Class or Kind Agreement with the Ombudsman.

EPAC’s submissions

EPAC’s investigation teams in the last two financial years looked like this:

Financial year	Investigation officer	Principal investigation officer	Director	Total
2016-2017	21	11	5	37
2017-2018	27 of whom 5.6 work in the PIT	12 of whom 1.0 is rostered full time in the PIT	6	45

With the establishment of the PIT, the number of investigators in each team can vary. There are 12 Principal Investigator positions (two per team). There are eight investigators in the PIT team (5.9 FTE). There are 20 FTE investigator positions across the 6 teams (Clerk 7/8).

Presently, across EPAC:

- 1 Principal Investigator and 2 x Investigators are on maternity leave.
- 2 Investigators are seconded to another department.
- 1 Principal Investigator is on long-term sick leave.
- 1 Investigator is on higher duties relieving the Principal Investigator on maternity leave, and
- There are effectively 2.3 FTE vacancies held against the part-time positions.

- 1 Principal Investigator was recruited in the April 2019 process, but will not take up duty until 1 July 2019.

There are also:

- 2 permanent investigators appointed above establishment as permanent backfill against temporary vacancies. This is an approved strategy to minimise delays in backfill and to enhance stability.
- 1 temporary investigator backfilling positions.
- 1 temporary Principal Investigator backfilling the long-term Principal Investigator position on sick leave.

The Preliminary Intake Team (PIT)

The PIT was implemented on 15 October 2018 with 5.6 FTE employees taken from existing staff within EPAC. One FTE was provided with a temporary engagement for the period of the trial. This temporary employee left toward the end of April 2019 due to ongoing health issues. The temporary employee has been replaced by a permanent investigator.

The Review was told by EPAC that there is considerable follow up required by investigators in the PIT and that the time spent receiving, assessing and preparing matters for allocation impacts on the workload of those members of the PIT who are rostered from the investigation teams. Prior to the implementation of PIT, investigators and Principal Investigators were spending approximately 50% of their time dealing with new referrals to EPAC. With the implementation of the PIT, the time that investigators and Principal Investigators are required to spend on intake duties has substantially decreased. As at Term 1 2019, investigators were rostered for a maximum of three days each per school term. Principal Investigators are not rostered to receive calls, however they are each rostered to be the DPI for 5 days per term.

At present, the Director of the PIT is also the Director of investigation Team 4. The Review was told that this arrangement was for a trial period, as there was a view amongst senior officers that the PIT Duty Director role should be on a rotational basis to maintain shared decision making in EPAC.

There was also an initial concern that the Director of PIT might be underutilised. EPAC has advised that after the trial period it has become apparent that there would be benefit in having a Director of PIT who is responsible for the management and development of the PIT. These include:

- Ongoing management and development of PIT staff
- Stakeholder communication and ongoing development of associated resources
- Development and delivery of specific training for stakeholders
- Increased quality assurance and identification and management of issues
- Consistency in decision making in relation to allocation of matters

EPAC has said that it would be preferable to have the PIT completely self-sufficient without having to draw on Investigators to fulfil rotational roles. This would have the advantages of:

- Investigation efficiency gains
- Greater quality control
- Consistent approach to intake
- Improved customer service

The role of the DPI of the PIT is currently a rotational role. When asked for the advantages and disadvantages of a permanent Principal Investigator for the PIT, rather than a rotational role, EPAC said:

Advantages:

- Coherence for PIT Officers
- Consistency in advice and decision making of the permanent Principal Investigator
- One decision maker for all intake matters that are enquiries
- Enhanced communication and consistency regarding day to day matters and advice
- Enhanced quality assurance and identification of any issues regarding performance of PIT members
- Increased team cohesion

Disadvantages:

- Principal Investigator on the PIT no longer able to undertake investigation functions
- Disrupts existing shared decision making which is an EPAC strength and to change this, risks eroding capacity building of Directors and Principal Investigators
- There may be fatigue and this system may not always be robust and risk becoming insular.

The PIT is presently undergoing an internal review. The results of that review were not available to us at the time of writing.

Staff turnover

EPAC has acknowledged that in 2016 and 2017 the morale of staff deteriorated to the extent that staff retention became an issue. Staff turnover is a significant loss of resources for EPAC. The amount of training and experience that is lost when an investigator resigns is a serious loss and the time taken for recruitment and retraining of new staff is substantial. Because of their recognised skills and experience, EPAC staff easily find new employment in other organisations for permanent roles or for secondment.

Vacant positions in EPAC

EPAC informed the review that as at the end of May 2019, there were effectively 3.3 temporary investigator vacancies. Further recruitment action has commenced to fill those

vacancies after finding that no suitable applicants applied in the last round of recruitment in April 2019. Three contractors have been recruited to write investigation reports. Contractors do not undertake investigations, but complete reports where the evidence has been collected to improve completion rates.

EPAC has also asserted that recruitment has been completed for “the one true vacancy in the Directorate”. The position has been vacant for three months after an investigator was medically retired. Recruitment has commenced for the temporary vacancy.

EPAC told that Review that it moves quickly to backfill vacancies, and that the only delays are caused by slow HR processes. We have considerable doubts about this, and we have received a number of reports that the true number of vacancies is greater and that unexplained delays in recruitment have routinely occurred over many years. EPAC has stated that 2 investigator positions were vacant for more than 3 months because the occupants were relieving as Principal Investigators. One position was vacant for more than three months because the officer was on sick leave and submitted time limited medical certificates. It is claimed that this situation is now resolved with medical retirement.

EPAC says that the filling of temporary positions can be problematic. Earlier recruitment processes were unsuccessful in attracting sufficient suitable applicants, as applicants were reluctant to accept temporary positions, were not suitable to be employed as investigators, or were not released by other organisations. The recruitment of a pool of investigators was advertised on 19 February 2019. The shortlisting of applicants, testing, interviews, referee checks and documentation were completed by EPAC on 8 April 2019. The process of appointing was protracted with the first appointee starting 22 May 2019 (existing contractor), the second starting 3 June 2019, and the third scheduled to start 1 July 2019.

There are currently two temporary staff backfilling temporary vacancies. There is also one contractor, with two more to start shortly.

EPAC informed the Review that the need for additional staffing depends to some degree on the functions that the Department expect to be performed by EPAC. For example, if EPAC’s role is to undertake extensive training and support to DELs and Principals to assist them in dealing with low-level misconduct matters and consumer complaints, EPAC would need dedicated training officers to provide online training packages and deliver targeted face-to-face training. Currently this role is performed intermittently and rather sporadically by senior officers (including the Executive Director) as well as senior staff from SECT and FACT. Maintaining the currency of online packages and travelling around the State is resource intensive and would require substantial augmentation of resources.

In addition, if FACT is considered to have a role in assisting Principals and DELs to handle complex complaints, a minimum of two additional officers at the 11/12 level would be required.

EPAC’s analysis of current workload indicates that, even at current workloads, some additional investigative resources will be required to achieve the desired goal of 80% of

investigations being completed within 12 months. Four additional investigators would be required to reduce the caseload to 5 matters per investigator.

EPAC has told us that as at May 2019, 83% of investigations are finalised within 12 months. This means that there are still a significant number of investigations which have been outstanding for more than 12 months. If the Department requires complex investigations to be completed within a shorter timeframe, resources would need to be commensurately increased.

In order to achieve acceptable completion rates, EPAC says the following is required:

- Allocation of a full-time, permanent Director and Principal Investigator and two additional Investigators to the PIT. This would ensure that investigators would not need to be rostered from the investigation teams and those employed in PIT could focus entirely on their intake and triage work. This would avoid the current rotation of a Director, Principal Investigator and investigators being rostered to the PIT.
- In order to reduce the current average timeframe of 40 weeks from receipt of a complaint until completion, additional investigators would be required.
- In order to reduce delays to a level that this Review considers acceptable (see later), it would be necessary to reduce average caseloads of investigators from the current 20 cases each to between 5 and 10 cases each
- In order to reduce the average caseload from its current level of about 20 to a level that would result in delays being significantly reduced to a level that this Review considers acceptable (see later), an additional complete investigation team would be required, as well as the enhancement of the PIT described above.

Consideration should also be given as to whether the Directorate will require some flexible funding to hire external investigators when special circumstances arise, such as a particularly complex investigation or when workloads are unexpectedly high. Such circumstances would include when the PSOA is a senior or high-profile employee of the Department, or where there is political imperative to complete an investigation viciously.

Current caseloads

On 30 May 2019, EPAC was investigating 544 cases of alleged misconduct divided into 337 reportable conduct cases and 207 other allegations of misconduct.

In May 2019, the average investigation caseload per investigator is approximately 20 cases. However, this does not include matters being locally managed and matters that are at the preliminary intake stage. This is to be compared to a caseload of about 30-40 cases per investigator in the period 2016-2018 (comprising both investigations and local management, but does not include preliminary intake matters). The preliminary intake matters are now managed by the PIT.

To put these figures into some context, the Review consulted with the Professional Standards Command of the NSW Police Force (PSC). The PSC investigate allegations of misconduct against police officers. The range of alleged misconduct is similar to the range of alleged misconduct in the Department of Education. It is therefore of relevance to look at the resourcing of the PSC and to compare it to the resourcing of EPAC. The PSC's investigation teams are structured in a similar way to EPAC. The Command has 6 investigation teams made up of 1 Inspector, 3 Sergeants and 2-3 Detective Constables. Each investigator has an average of 2 investigations at any given time with an average completion time of approximately 45 days for less complex matters and 90-135 days for more complex matters. This is considerably less than the average completion time for matters investigated by EPAC. The caseload of investigators in the PSC is considerably less than for EPAC investigators.

The Victorian equivalent of EPAC is the Employee Conduct Branch. Each investigator in that branch has approximately 10 misconduct matters for investigation at any particular time. The average length of time until finalisation of misconduct investigations is 6-9 months.

The Queensland equivalent of EPAC is the Integrity and Employee Relations portfolio within their Department, which includes an Intake and Assessment team, an Investigations team, and a Performance and Conduct team. The Investigations team consists of a manager, 2 Principal Investigators and 15 Senior Investigators. The Performance and Conduct team, which is responsible for considering disciplinary action in relation to performance and conduct related matters, is made up of 1 manager, 1 Principal Advisor, 5 Senior Advisors and 1 Advisor. On a per capita basis, these are considerably more resources than those allocated to EPAC in New South Wales.

Use of private contractors

The Review was told that the EPAC Directorate conducts its own investigations and rarely briefs investigations out to private investigation consultants. However, private consultants are employed from time to time to assist in writing investigation reports. Private contractors are provided with a more basic induction than permanent staff.

They are provided with copies of the Department's policies and procedures as well as examples of quality EPAC reports. Contractors are teamed up with more senior staff to familiarise them with processes. They are briefed on each matter they receive and provided with the relevant policies and practices related to the matter they are working on. Staff are also provided individual feedback on each report they write.

Investigation reports are a critical aspect of the work of EPAC. In order to write a professional investigation report, it is necessary for the report writer to have considerable analytical and writing skills. EPAC has conceded that there have been a number of private contractors whose services had to be terminated because their skills were not adequate. There have been occasions when it was necessary to hire a private contractor to conduct a complete investigation. For example, where the size of the investigation may have a significant impact on the capacity of EPAC to carry out its normal work, a private contractor

may be required.

In 2018, EPAC was funded to employ a number of private contractors to overcome the substantial backlog of investigations. This strategy assisted EPAC investigators to complete a high number of matters in 2018 and to reduce the backlog. The Review was told by some former and current EPAC employees that the use of contactors was costly and often ineffective. Since April 2017, 5 contractors have been terminated prior to the end of their contract. All contractors were given notices of the concern and provided with 5-10 days to address the issues raised. This exceeds the contractual obligations of the Department which has the right to terminate a contract on an hours' notice without cause.

On the other hand, some of the private contractors have proven to be skilful and highly professional and have secured employment in EPAC. Of the 29 contractors who have been employed in EPAC, 15 have been selected in a merit selection process for a temporary or ongoing position.

The Review received several submissions suggesting the undesirability of using outside contractors to conduct investigations. For example, New Law has suggested that "Our considerable experience across a range of these examples in no way suggests to us that the use of private investigators or private investigating bodies is in any way more efficient or more procedurally fair. They may be faster (although that is certainly not always the case) but speed does not equate with efficiency. Private workplace investigation organisations lack the relevant corporate knowledge and, instead, attempt to apply general investigation techniques and processes which are totally unsuitable to the education environment and fail to recognise the way an enterprise operates."

EPAC's response is that contractors are not used to replace investigators, but only to assist in the writing of investigation reports at times when work pressures are high. EPAC no longer receives additional funding for contractors but has continued to use them when there have been temporary vacancies and no suitable applicants have been recruited. Contractors can be hired expeditiously when work pressures are high. It is a responsive mechanism for enhancing resources during peak periods of high workload.

EPAC says that temporary staff are the preferred option to fill temporary vacancies, however, the Directorate has had real difficulty attracting applicants to temporary positions.

School-based knowledge for investigators

Another issue raised by many stakeholders is the desirability for investigators to have school-based knowledge so as to understand the context in which allegations of misconduct are made.

DEs and Principals have reported frustrations in dealing with investigators who do not display an understanding of the context in which schools operate.

New Law submitted that:

“We are of the view that a re-balancing exercise, to include at least some investigators who have experience ‘at the coalface’ would be of benefit and this is a recommendation that we would strongly urge as part of this review.”

The NSWPPA submitted:

“The lack of contextual knowledge within the EPAC workforce is one of the most significant issues facing the directorate. A high percentage of EPAC employees have little knowledge or experience of the ways schools operate. EPAC investigators are part of the public service rather than the teaching service and the SPC believes this needs to be rectified. School employees, such as a high school Principal/Deputy Principal, have extensive investigative experience and possess the skills and contextual knowledge to provide high quality support to schools. Developing the connection between EPAC and schools and utilising this expertise would help address the significant turnover of employees at EPAC in recent years. There is much to gain by school-based employees being given the chance to gain specialist knowledge working in EPAC and then taking this knowledge back to the school environment.”

The Teachers Federation submitted:

“The lack of investigators from a teaching background has a negative impact on the quality of decisions. The near total absence of teachers from the current cohort of investigators undermines the confidence in schools that investigations are conducted by officers who understand the organisation and administration of schools.”

The Department’s SO&P has suggested that consideration be given to the appointment of a minimum of three Principal Liaison Officers (Primary, Secondary, SSP) to the conduct area of EPAC in order to provide advice and expertise from an operational perspective. This advice would include participation in intake panels.

When the Child Protection Investigation Directorate (CPID) was first formed in the mid-to-late 1990’s, most of the investigators were former teaching staff. EPAC says that the Department was roundly criticised by the NSWO in a report following the Wood Royal Commission (discussed in Chapter 1) and it was recommended that the Department recruit trained investigators and particularly those with child protection experience, rather than employing former teachers. The Department acted on that. Over time, the skill base of EPAC managers and investigators has become predominantly based on conduct of investigation, analysis of evidence and writing of reports. The vast majority of EPAC managers and investigators are now no longer former school employees.

We are told by EPAC that there are some permanent EPAC staff who were previously qualified, full-time teachers, including 3 Directors, 2 Principal Investigators and several investigators. However, these employees are predominantly in the SECT area, managing performance issues, and their school-based experience was many years ago. These former

school employees are available for consultation by investigators, although their predominant role is in SECT.

EPAC response to this perceived shortcoming is that investigators attend schools regularly to conduct investigations and have daily interaction on the phone with Principals and other school executive staff. It is therefore submitted by EPAC that investigators are regularly exposed to school life.

For all these reasons EPAC says that “it is quite inaccurate to think that EPAC staff do not understand school environments or the issues faced by schools.”

It is apparent to us, however, that new investigators would benefit from spending a small amount of time in the classroom of: a primary school; a secondary school; and a SSP, as part of the induction process of new investigators.

IT and website issues

EPAC uses the *Resolve* case management system for investigation records and management. This system forms a complete digital record of every investigations. As well, *Resolve* has a case management function and a reporting capability which can provide information about timeliness and performance. Over time, EPAC has made enhancements to the *Resolve* system to improve its capacity to inform investigators and their managers about the progress and timeliness of cases.

The *Resolve* program was not designed to provide ready access to business intelligence, nor to coordinate with the Department’s other existing business intelligence systems (such as personnel and student records). The Review understands from EPAC’s submission that this is a significant limitation of the role that EPAC can play in preventing misconduct and collaborating with other parts of the Department to achieve broader strategic goals. We have been informed that EPAC will be reviewing its case management systems and may procure a new system in 2020 if funding is made available.

EPAC team Directors can see the progress of matters held by their team members and how long a matter has remained at a particular stage. *Resolve* has stage clocks which are colour coded to show an investigator and his or her managers when matters are approaching a deadline and when it is overdue. Where matters are approaching timeframes for each stage (based on an indicative 40-week investigation period) the stage clock will move to yellow and then red when overdue. *Resolve* does allow Directors to print reports for matters which are of a certain age, and to identify those matters which are outside finalisation timeframes.

The Review received submissions that while *Resolve* informs Investigators what the next task is to complete, that hardly anyone looks at this and no one is held accountable for any timelines that have passed until a stakeholder makes a complaint or an enquiry. Also, because the EPAC team Directors are so pressed for time because of the number of matters held by investigators that they are supervising, they often do not have the time to deal with unacceptable delays in communication between case officers and relevant stakeholders. We

were told that some investigators set calendar reminders on Outlook email to remind themselves of upcoming time frames.

Despite attempts to have *Resolve* provide a flexible real-time reporting dashboard, there are system limitations which mean that the presentation of information is not visually informative and there is no capacity for an individual to set up user preferences. For example, the system does not allow the operator to set an automatic scheduling of a case review at any particular number of weeks.

While *Resolve* could be strengthened to be more user friendly and flexible, it has only rudimentary tools to effectively monitor workflow and time limits.

EPAC submitted that the Executive Director and team Directors are provided with monthly reports from the *Resolve* case management system which provide information about the status of active matters, the list of investigations on hold, the progress of matters that are currently before the courts and a progress of all the matters where employees are currently on alternative duties or have been suspended. EPAC submitted that the Executive Director raises any issues of undue delay with the relevant Director for their management. Additionally, we understand that the EPAC Director, Systems and Practice reviews the progress of all delayed matters every month and holds a monthly “call over” meeting to highlight these and any other high-risk matters.

Contact database

The Review has been made aware that enquiries to EPAC that do not lead to an investigation and that do not amount to misconduct are not entered on *Resolve* but are entered on an Excel spreadsheet database known as *Contact*. The *Contact* database is not readily searchable and does not interact at all with any other databases. The database was created in November 2018 and was intended to capture all calls coming into the PIT that are outside the scope of EPAC’s business. We were told by EPAC that the database has proven to be problematic in its current form and that the *Contact* database will be transferred to a new stream of work within *Resolve* by 1 July 2019, allowing information to be searched within *Resolve* and eliminating the current parallel system. We are of the view that it is highly undesirable to have a separate database for these Enquiries.

PIT Form

We were provided by EPAC with a copy of the PIT form. We are of the view that the form is a rather informal and unhelpful addition to the EPAC arsenal of measures to obtain information from complainants. We are of the view that it is most inefficient for this information to be handwritten or typed by the intake officer, and then if the decision is made for an investigation, the information needs to be rewritten into the *Resolve* database. We are of the view that *Resolve* should be re-engineered to allow the original information from the complainant to be entered directly into the database.

Communication with PSOAs, complainants, schools and other stakeholders

The Review received numerous submissions from Directors, Principals, complainants and former PSOAs alleging poor communication from EPAC. Numerous PSOAs related accounts of hearing nothing from EPAC for 6-12 months, of phone calls not being returned, and that when they finally did receive communication from EPAC it provided no real information at all.

Some Principals reported that they did not receive the level of support or the information from EPAC that they needed in order to adequately manage the absence of a PSOA from their school when that PSOA had been placed on alternative duties. They said that it was impossible to make plans when EPAC was unable to give them any indication of when a decision was likely to be made.

The New South Wales Secondary Principals' Council (NSWSPC) submitted that:

“EPAC fails to take calls from Principals to manage ongoing low-level staff behaviours. While teachers have the support offered by the NSW Teachers Federation, Principals are left to manage these situations in isolation with no support from the DoE... The school is expected to conduct an investigation and make a determination on the issue which is then provided to EPAC to make a final decision. The notion of a school investigating itself contradicts best practice guidelines for complaint procedures... EPAC's feedback to Principals managing staff members is minimal to non-existent and it is often left to the Principal to answer questions from the community.”

The New South Wales Primary Principals' Association (NSWPPA) submitted that EPAC should:

“Build greater trust by providing quality information, and that greater commitment from EPAC personnel via telephone and email response to Principals is necessary”.

It is quite apparent that over a lengthy period of time EPAC has failed to communicate in a timely fashion, particularly with PSOAs and Principals of schools where employees have been removed pending the outcome of an investigation. DELs, Principals, organisational stakeholders and PSOAs have complained of inexcusably long absences of any communications from EPAC on the progress of matters by investigators.

EPAC procedural guidelines require that PSOAs be updated of the progress of their matter after 18 weeks and then every 12 weeks. EPAC Directors are supposed to hold monthly case reviews with each of their investigators, so that if there has been inactivity on a matter or any other issue causing delay, the Director can detect it and ask the investigator to remedy the situation.

EPAC suggest that it is not always helpful to regularly update victims who are experiencing trauma as a result of the alleged conduct. They point out that the early referral of victims to

appropriate therapeutic support services (e.g. school counsellors, sexual assault counsellors, et cetera) forms part of EPAC's risk assessment tasks. They submit that EPAC is responsive to parental requests for updates, however, for privacy reasons the information that EPAC can provide may be quite limited.

Clearly, whatever systems are in place to monitor the frequency of communications are failing.

ANALYSIS AND RECOMMENDATIONS

EPAC staff resources and caseloads

It is abundantly clear from all the information which we have gathered and from the submissions that we have received that EPAC has been, and continues to be, seriously under-resourced in terms of staffing. This has placed EPAC staff under intolerable pressures on an ongoing basis for many years. The staff of EPAC are genuinely interested in doing a professional job in this most challenging area. In 2002, the precursor to EPAC, called the CPID, was staffed by a Director and about 55 staff, of whom around 36 were investigators. It can therefore be seen that the current number of investigators is almost the same as it was in 2002, despite the enormous increase in cases for investigation. The under-resourcing of EPAC is also apparent from a comparison with similar units in other jurisdictions, and from other agencies in New South Wales that perform a similar function to EPAC in other professional areas.

The lack of adequate human resources is the main reason why EPAC has had such long-standing problems with the timeliness of investigations and the inadequacy of communication with PSOAs, alleged victims and school managers. Whilst some of the backlog of cases was dealt with during 2018, the delays still continue to be unacceptable.

Delays in the completion of investigations create havoc in the lives of those who are being investigated and create black holes in schools, when Principals are unable to fill the positions of those employees who have been suspended or placed on alternative duties. The human cost of extensive delays is huge; the financial cost to the Department is considerable.

It is useful to compare the timeliness of EPAC investigations with those conducted by the Professional Standards Command (PSC) of the New South Wales Police Force. The PSC conducts enquiries into allegations of misconduct by sworn police officers and unsworn police employees. The PSC has a fairly similar structure of investigators to EPAC and even a similar number of investigators and managers. However, the PSC is able to complete most of their investigations in a much shorter time than EPAC. The average completion time for PSC investigations is approximately 45 days for less complex matters and 90-135 days for more complex matters. The completion time for EPAC investigations has been, and remains, considerably more than that at every level of complexity. We were informed that each investigator in the PSC generally holds no more than two investigations at any particular time. In the past, EPAC investigators have held 20-30 investigations at any particular time.

The current average for an EPAC investigator is approximately 20 cases.

During the 12 months just ended, 47% of EPAC investigations remained uncompleted after nine months. This, in our view, is unacceptable, and demonstrates that serious under-resourcing of EPAC continues.

In Victoria, investigators in the equivalent of EPAC hold between approximately 5 and 25 cases each, depending upon the complexity and scale of the investigation. We understand that when matters are allocated in EPAC, there is little consideration given to the complexity and scale of the anticipated investigation. This is a shortcoming in the allocation of cases.

Queensland, which has a much smaller number of schools and teachers than New South Wales, has teams for conducting investigations and decision-making of a similar size to EPAC. It is clear that similar agencies in other States have more human resources per capita than EPAC.

We suggest that sufficient human resources should be allocated to EPAC in order to reduce the average caseload of investigators to a level that would result in the average completion time of misconduct matters being as follows:

- Simple cases: no more than 90 days (three months)
- Median cases: no more than 180 days (six months)
- Complex cases: no more than 270 days (nine months).

Obviously, there will be a small number of highly complex investigations that may take longer than this, but equally there will be some less-complex cases that should take less than three months.

In consultation with EPAC, we have assessed that in order to achieve the above time limits, it would require average caseloads of EPAC investigators to be reduced to 5-10 each investigator, rather than the present 20. This will obviously require additional investigators to be appointed to EPAC. We believe that at least one additional complete investigative team is required, consisting of a team Director, a Principal investigator, and four investigators. This is in addition to the resources that we have suggested are required to place permanent intake staff in the Preliminary Intake Team as described below and in chapter 6. This would make a total of 12 additional positions.

Filling vacant positions

We understand from submissions received that EPAC has always had a sizeable number of positions unfilled. This continues to be the case today, with a number of vacant positions due to maternity leave, secondment, sick leave and other reasons. Part of the reason why this has occurred is the difficulty of recruiting suitably qualified investigators in a market where such qualifications are in great demand in both the public and the private sector. We make recommendations about recruitment practices below. We urge the urgent recruitment of

persons to fill existing vacant positions in EPAC. However, this alone will not reduce the caseload of investigators to a sufficient degree that will allow the average completion time to be reduced to the levels suggested above.

We are of the view that EPAC should be more diligent in the recruitment of staff that resign, transfer or go on long-term leave, so that glaring vacancies are not left open for many months at a time.

The Preliminary Intake Team (PIT)

The PIT has been a very useful and efficient addition to EPAC. Its usefulness should be enhanced by having a permanent staff, rather than staff being rotated day-to-day or week-to-week from the teams of investigators. The Director of the PIT should be a permanent full-time position, rather than the present situation in which the holder of that position is also the Director of a team of investigators. Similarly, the Principal Investigator in the PIT should be a permanent member of the PIT team, rather than being on rotation. If there is to be any rotation of those working in the PIT team, the rotations should be for at least six months. This will require the appointment of an additional Director, Principal Investigator and several investigators.

We understand that at the present time there is very little if any consideration given to rating cases when they are allocated by PIT to a team of investigators. We recommend that a rating system of cases should be devised by EPAC so that at the pre-investigation stage, when a matter is allocated to an investigator, an assessment can be made as to the anticipated complexity and scale of the investigation. We would suggest that the rating system should categorise cases into three different categories (as suggested above):

- simple cases
- median cases
- complex cases

Whilst the initial assessment will not always turn out to be accurate, this is still a basic requirement for the efficient and fair allocation of work between investigative teams and between investigators. This will also allow the more senior investigators to receive the more complex cases for investigation.

EPAC recruitment

EPAC investigations require investigators to have superior skills in interviewing of witnesses (particularly children), the analysis of evidence (sometimes quite complex), and report writing. There is also a requirement for good judgement in arriving at recommendations for suggested disciplinary or remedial action.

We are of the view that EPAC should continue to recruit persons who have such skills. We

understand that up until now EPAC has given priority to recruiting persons who also have previous experience in the child protection arena. We are of the view that this unnecessarily reduces the number of suitable applicants for positions in EPAC, and this may be the reason why it has been so difficult to attract a sufficient number of suitable applicants for positions in EPAC. A knowledge of child protection issues, including child protection legislation, can quickly and easily be learnt by a smart junior EPAC employee, whilst skills in interviewing, analysis of evidence and report writing are often inherent. We therefore recommend that EPAC change its recruitment practices so as to include a larger pool of suitable applicants, including those with no prior child protection experience or knowledge. We are of the view that this will encourage a larger cadre of young, suitably qualified employees to enter EPAC, who, hopefully, will remain in EPAC and eventually take up leadership positions.

Turnover of EPAC employees

EPAC has a high turnover of employees, which is enormously costly in terms of the loss of corporate knowledge, training and experience. It is also very time-consuming for managers to engage in repeated recruitment of new employees. We are of the view that there are a number of reasons for the high turnover of staff in EPAC:

- one reason is the extremely high workload that EPAC investigators have borne over a lengthy period of time until the present day. If our recommendations about caseload above are accepted, this will help alleviate some of the loss of good quality staff to other positions in the public and private sector.
- Another reason for high turnover is that there is a large gap in pay and seniority between investigators at 7/8 level and Principal Investigators at 11/12 level. There is even a large gap between Principal Investigators at 11/12 level and team Directors who are Public Service Senior Executives. We recommend the creation of investigator positions in between the 7/8 and 11/12 levels, so as to create a smoother career path for those who enter EPAC at the base level and who wish to remain in EPAC and progress their careers. We would suggest that investigators at 7/8 level should do the simple investigations; those at the 9/10 level should do median investigations; and those at the 11/12 level should do the complex investigations.

We are also of the view that EPAC investigators are not provided with adequate feedback about decision-making to assist them in investigations and report writing. We will make suggestions elsewhere for the flow of information from decision-makers to investigators.

Use of private contractors

We are of the view that it is undesirable to hire private contractors to do the work of EPAC, even to do report writing where investigations have been conducted by permanent employees of EPAC. This is because it is hard to educate private contractors in the care, ethos and approach that EPAC requires to be taken to allegations of misconduct when those private contractors are provided with a reduced induction process and they lack the degree of

knowledge and experience that permanent employees derive over a substantial period. We recommend that private contractors should only be used in cases of extreme need. We would hope that if recruitment practices are enhanced and caseloads are reduced through the appointment of additional staff, and if the PIT team is provided with permanent employees, the need for private contractors will be reduced to only odd occasions when special needs arise.

IT resources

We are of the view that the *Resolve* system of case management is only barely adequate to meet the needs of EPAC and the Department. On an urgent basis, *Resolve* should be enhanced to allow individual investigators to set their own time limits and alarms. However, *Resolve* does allow investigators and their managers to set timetables for notifications or other communications with PSOAs and schools. *Resolve* does allow managers in EPAC to supervise investigators in their team.

In our view, the timeliness problems in EPAC do not derive from the inadequacies of the *Resolve* system, but rather from a lack of human resources and shortcomings of management strategy. We have been provided with evidence from a wide variety of sources that some managers of teams in EPAC do not adequately supervise their investigators to monitor the timeliness and quality of investigations or the frequency of communications with PSOAs and schools. There is no impediment to managers accessing the *Resolve* system on a regular basis to review issues of timeliness. We do not believe that this is just a workload issue, but rather it demonstrates an absence of proper supervision by some managers. We recommend that all EPAC managers be required to focus on the proper and appropriate management of timeliness of investigations conducted by members of their team, and that the Executive Director regularly ensures that this is done.

We have been informed that another parallel system of recording, known as *Contact*, is used by EPAC to record details of complaints which fall short of misconduct and which are remitted back to line managers in schools to manage. We are of the view that all information derived from enquiries and reports to EPAC should be recorded on the one database, and at the present time that is the *Resolve* database. We recommend that the *Contact* database be abandoned and that all future enquiries and reports be entered into the *Resolve* system.

School-based experience of EPAC investigators

As we have stated, submissions have been made by many stakeholders that investigators should have some school-based knowledge of the context in which allegations of misconduct are made. However, we are of the view that such background knowledge can readily be obtained in the course of investigations, and that such background knowledge accumulates over time when an investigator conducts a number of investigations. It is of far greater importance that investigators have superior skills in communicating (during interviews, particularly with children), analysing evidence, and writing of reports. Our analysis of about 40 EPAC files has shown that in each case the investigator has had considerable contact with

the Principal of the school concerned, and often with other teaching staff. We believe that this is sufficient to provide the investigator with the context in which an allegation of misconduct is made.

However, we are of the view that there would be benefit in including in the induction process for new EPAC staff a short period (of a day or so) in each of a primary, secondary and special school.

We do not recommend that EPAC go back to the system that existed in the mid-to-late 1990s of recruiting school-based staff to conduct investigations. However, this would not preclude an otherwise suitably qualified Principal, DEL or teacher from applying to join EPAC if that person had the requisite skills.

Communication with PSOs, school managers and other stakeholders

It is clear from the bulk of submissions received that EPAC is seen by its stakeholders as having a serious problem in the timeliness and frequency of communications. There has been too little emphasis in EPAC to communicating effectively with PSOs, school managers, alleged victims and other stakeholders. To some extent, this has been due to a lack of resources and a decision to prioritise some investigations, particularly old ones, sometimes at the expense of communicating with relevant stakeholders.

EPAC have submitted that their procedural guidelines provide a framework for periodic updates to PSOs at 18-week and then at 12-week intervals. The *Resolve* workflow includes actions to prompt these update letters. EPAC suggests that stakeholder communication is monitored as part of the case review process, and that the updating of alleged victims will vary depending on the specifics of each case.

While there are established time frames for EPAC communicating with relevant stakeholders, we believe that those standards have frequently been ignored. We recommend that all levels of EPAC management insist that at least once every school term there is regular communication to update PSOs, alleged victims and school managers about the current state of an investigation and the likely length of time before completion of it. In the past, what communication that did occur was of a rudimentary nature, often merely communicating that the investigation was continuing. We are of the view that regular communication should provide more information about the course of the investigation and the anticipated timeframes.

We recommend that stakeholder communication should be regularly monitored as part of the case review process and that the updating of PSOs, alleged victims and school communities should provide more information.

RECOMMENDATIONS:

1. We are of the view that EPAC continues to be seriously under-resourced in terms of

the number of investigators. We recommend that sufficient human resources be allocated to EPAC in order to reduce the average caseload of investigators to a level that would result in the average completion times of misconduct investigations being as follows:

- a. Simple cases: no more than 90 days (three months)
- b. Median cases: no more than 180 days (six months)
- c. Complex cases: no more than 270 days (nine months).

Obviously, there will be a small number of highly complex investigations that may take longer than this, but equally there will be some simple cases that should take less than three months. In consultation with EPAC, we have assessed that in order to achieve the above time limits, it would require average caseloads of EPAC investigators to be reduced from the present 20 cases each investigator to 5-10 each investigator. This will obviously require additional investigators to be appointed to EPAC. We believe that at least one additional complete investigative team is required, consisting of a team Director, a Principal investigator, and four investigators. This is in addition to the resources required to place permanent intake officers in the Preliminary Intake Team (PIT) rather than on rotation, as described below and in chapter 6. We therefore recommend an additional 12 positions in EPAC (2 Directors, 2 Principal Investigators and 8 investigators) in order to meet the time limits suggested above.

2. We recommend that the PIT team be enhanced so that its members are no longer rotated from other teams, but instead are permanently deployed to the PIT team, or at least deployed for a period of 6-12 months. As suggested above, this will require the appointment of an additional PIT Director, an additional PIT Principal Investigator and 4 additional PIT intake officers.
3. We recommend that EPAC change its recruitment practices to include applicants with no prior child protection experience or knowledge, but rather to focus on those candidates with suitable skills in communication (interviewing), location and analysis of evidence, and report writing skills. We are of the view that this will create a larger pool of suitably qualified applicants applying to enter EPAC. We are of the view that the previous focus on prior child protection experience unnecessarily limits the pool of available applicants.
4. We do not recommend that EPAC go back to the system that existed in the mid-to-late 1990s of recruiting school-based staff to conduct investigations, however, this would not preclude an otherwise suitably qualified Principal, DEL or teacher from joining EPAC if that person had the requisite communication, analytical and report writing skills.
5. We recommend against the use of private contractors being used in misconduct investigations. The quality of their work is variable. In our view, they should only be utilised in cases of extreme need.
6. We recommend that EPAC be more diligent in the speedy recruitment of staff that resign, transfer or go on long-term leave, so that vacancies are not left open for many months at a time. We recommend that a concerted effort be made to fill existing vacant positions.
7. We recommend the creation of some investigator positions between the present 7/8 and 11/12 levels, so as to enhance career prospects for those entering EPAC at the base level and encouraging them to stay at EPAC.

8. We recommend that a case rating system should be introduced by EPAC so that at the preliminary intake stage, when a matter is allocated by PIT to a team of investigators, an assessment is made as to the complexity and scale of the investigation, so that cases can be assigned into the three categories listed in recommendation 1 above. Whilst the initial assessment will not always turn out to be accurate, this is still a basic requirement for the efficient and fair allocation of work between investigative teams and between investigators. This will also allow the more senior investigators to receive the more complex cases.
9. We recommend that in the long-term the *Resolve* system be replaced by one which is more amenable to an interface with other computer databases in the Department and one which is more user-friendly and amenable to individual settings.
10. We recommend that the PIT intake form be abandoned, and that all information obtained from complainants be entered directly into the *Resolve* database.
11. We recommend that the *Contact* database be abandoned, and that all information received by EPAC should be recorded directly on the *Resolve* database.
12. We recommend that all EPAC team Directors be required to exercise appropriate supervision of the timeliness of investigations in their team. This will require more frequent and intensive monitoring of investigations by managers. We recommend that case reviews by managers should occur on a monthly basis.
13. We consider that there is merit in the Directorate maintaining its own legal officers, separate from the Department's Legal Services Directorate. This provides the staff of EPAC with ready access to legal advice. In addition, later in this report we make recommendations that, if accepted and implemented, would involve further input by the legal officers of EPAC.
14. EPAC has on many occasions failed to communicate effectively and appropriately with PSOAs, school Principals, DELs, alleged victims, complainants and other stakeholders. While there are established timeframes for EPAC communications with relevant stakeholders, those standards have been ignored by some investigation teams. We recommend that all levels of EPAC management insist that at least once every school term there is regular communication to update PSOAs, alleged victims, complainants and school managers about the current situation and likely future course of action in every active investigation. In the past, what communication that did occur was of a rudimentary nature, often merely conveying that the investigation was continuing. We are of the view that regular communication should provide more information about the course of the investigation and anticipated timeframes.

CHAPTER 6

INTAKE OF ALLEGATIONS

Outline

EPAC receives more than 3,000 inquiries per year from Principals, DELs, school executives, head teachers, teachers, parents, and other sources. Only a small proportion of these matters result in investigations by EPAC, however, a significant number of them are low-level misbehavior allegations that are termed as an “Enquiry” and are referred back to school Principals or other senior Departmental employees to handle at the local level. Of those that warrant investigation for possible misconduct, a small minority of them are deemed suitable for investigation by local school managers (termed “local management”), while EPAC provides oversight and makes a final decision on outcome. All other allegations of misconduct are investigated by the staff of EPAC.

We have been informed that in the period between 1 September 2018 and 31 May 2019, EPAC received:

- 946 enquiries not related to child-protection (matters fully assessed by EPAC and found to be outside of their jurisdiction and/or better managed locally by Principals/DELs or other managers)
- 609 enquiries related to child-protection (as required by legislation and the Department’s policies in relation to child protection. These matters are received by EPAC which conducts preliminary inquiries before the matters are found to be outside of their jurisdiction and/or better managed locally by Principals/DELs or other managers).
- 150 matters referred for Local Management (where action is taken by the school Principals/DELs and oversighted by EPAC)
- 46 GS10 (matters not investigated but dealt with by way of a letter of warning)
- 513 matters which were allocated for a full investigation by EPAC.

These figures indicate that 77% of all matters reported to EPAC during that period did not proceed to an investigation. The question that arises is whether this indicates that EPAC is allocating too many resources to low-level misconduct matters, Enquiries, and Local Management matters.

EPAC has informed us that in their opinion there is a need to retain a broad approach to child protection matters. EPAC would not seek to limit the reporting to them of child protection matters because this ensures:

- The centralised capture of all child-protection allegations, including minor allegations

- The early identification of more serious conduct (grooming/crossing professional boundaries) and/or patterns of repeated conduct, particularly in relation to employees who work across multiple sites, such as casual teachers
- The Department is able to comply with statutory responsibilities under the reportable conduct scheme.

We accept that there would be substantial risks to students and the Department in failing to capture these matters. We therefore do not recommend any change to the reporting of low-level misconduct to EPAC.

EPAC claims that it encourages schools to make contact with them if they seek any guidance about an allegation of misconduct or if they need further advice on the best way to handle a complaint. However, Principals and the Department's SO&P have submitted to the Review that in recent years EPAC has provided far less assistance to school managers than in the past. This may very well be a product of a huge increase in the number of enquiries over the last five years and unacceptable caseloads of investigations. When faced with the choice of advancing severely delayed investigations or responding to school enquiries about low-level misconduct, sometimes the former is given a higher priority.

In 2015, the Commonwealth Government established the Nationally Consistent Count for Students with Disability (NCCD). This initiative established clear counting protocols which focused on students and their functional needs for additional support. In late 2015, the NSW Ombudsman requested the education sector to identify students with disability and to focus on their additional needs, including reportable conduct investigations. EPAC made changes to its database to ensure that data about students with disability is always collected at the point of intake. In recognition of the additional risks these students face, EPAC ensures that all matters which involve a child who is identified as needing extra support under the NCCD are reviewed by a senior officer to determine the most appropriate way of handling the matter.

The intake and allocation process

The Review was advised by EPAC that 86% of investigations allocated since the creation of the PIT came into EPAC by telephone. We understand that the remaining ones come in using the online EPAC form or occasionally in hard copy form.

When a call comes into EPAC, the intake officer, who is an EPAC investigator, takes down the details of the matter on a form known as the "PIT form". We have been provided with a copy of that form, and we are of the view that it is very basic.

The main decision made in PIT is whether a matter is to be categorised as an "Enquiry", as a "Local Management" matter (for local school investigation but EPAC decision) or as suitable for an investigation by EPAC. The Duty Principal Investigator (DPI) in PIT has the authority to have a matter dealt with as an Enquiry after he or she has assessed it. The Duty Principal Investigator is a rotating role. Allegations of misconduct warranting an investigation,

including reportable conduct and criminal matters, go to the PIT Duty Director in a daily Allocations Committee, consisting of the PIT Duty Director and an "Allegations and reporting officer". The present Director of PIT is also the Director of investigation team 4. Essentially, the present process is for the Duty Director in PIT to make a decision on his or her own as to whether or not there is to be an investigation. Once a decision has been made by the Duty Director that there is to be an investigation, the matter gets allocated to 1 of the EPAC team Directors for allocation to an investigator in his or her team.

If the matter is considered as suitable for investigation, either by EPAC investigators or local managers (with EPAC oversight), the details are entered into the *Resolve* system. If the matter is considered to be merely an enquiry of a general nature, it is generally entered on the *Contact* database. We have previously stated our dislike for having these two parallel systems and our recommendation for all intake matters, including enquiries, to be entered on the *Resolve* system.

'Enquiries' to EPAC

An Enquiry is a matter that does not meet EPAC's threshold for misconduct, but rather is considered to be low level conduct and is referred back to the DEL or Principal for local management. An example would be: an isolated incident of a teacher inappropriately swearing at students in the classroom.

EPAC claims that DELs and Principals communicate freely with the PIT, the DPI and the PIT Duty Director and are provided with advice as requested. In the past, EPAC has assisted DELs and Principals to script written directions for teachers who have committed minor acts of misbehaviour. However, in more recent times, EPAC has resisted writing or editing written directions when Principals or DELs have asked for assistance. EPAC is of the view that such tasks are within the ambit of the work of a DEL or Principal. DELs have always had a line management responsibility to support Principals in responding to and managing low-level misconduct by school staff. EPAC firmly believes that EPAC is not the appropriate body to provide such detailed, operational management assistance. EPAC is of the view that this is part of the core functions of a school Principal as outlined in the *Teaching Service Regulations 2017*, s. 9 – Management of schools – which includes the management and discipline of staff and students.

At this time, EPAC does not keep a record of the outcome of low-level misbehaviour Enquiries. Indeed, Departmental records do not record such details on the personnel files of employees. This means that if there are multiple Enquiry matters involving the one employee, neither EPAC nor the Department has a record of that person's conduct or performance history, which may make it difficult to assess the significance of any future misconduct. We consider that DELs and Principals should be required to advise the Department of the outcome of an Enquiry matter that has been reported to EPAC, so that there is a complete and central record of the conduct of the employees concerned. This may go some way to ensuring that EPAC has access to records of any persistent and accumulating misbehaviour by employees.

Local Management (LM) of complaints

Local Management (LM) of complaints is where a complaint is allocated by EPAC for investigation by a local Principal or DEL, but the final decision is made by EPAC. This option for fast, local management is made when the allegation is more serious than an “Enquiry”, but it is still potentially low-level misbehaviour that warrants some remedial action.

Examples would be:

- A teacher pushing, shoving, pulling, grabbing or forcefully tapping/hitting students (where there is no injury)
- A teacher belittling or making offensive comments to a student
- A teacher purposely blocking a doorway to prevent a student leaving a room
- A teacher making an inappropriately crude, sexual joke in front of a class.

These matters are generally low-level, child protection matters that amount to reportable conduct. The ED of EPAC has informed us that the matters that are allocated for LM are those that come within the Ombudsman’s reportable conduct scheme and fall within the “class or kind agreement” with the Ombudsman. These matters are oversights by EPAC because the Department is required to demonstrate to the Ombudsman that it has taken appropriate action with regard to them. Under s. 25CA of the *Ombudsman Act 1974*, the Ombudsman “*may exempt any class or kind of conduct of employees of an agency from being reportable conduct*”. The Ombudsman has a “class or kind agreement” with the DoE which exempts the Department from reporting certain classes or kinds of reportable conduct, provided that these matters are still the subject of disciplinary action by the Department. EPAC has said that these agreements represent a level of trust that the Ombudsman places in the Department’s investigations and child protection systems.

These matters are referred by EPAC to the local DEL or Principal for investigation with the assistance and oversight of EPAC. The Principal or DEL has to agree to do a local investigation. Otherwise, EPAC will conduct the investigation. Once the investigation is complete and recommendations have been made by the Principal or DEL who has conducted the investigation, all the information is sent back to EPAC for a final determination to be made. An EPAC Director signs off on the outcome, but it is invariably based on the DEL or Principal’s assessment of the outcome. The EPAC investigator then attaches the finalisation category on *Resolve* for recording the matter and reporting to the NSWOO (if required) and ensures that all administrative actions have been undertaken. It would be rare for an EPAC officer to change the outcome from the assessment made by the DEL or Principal.

LM matters are more fully described and analysed in Chapter 8. In this chapter, we discuss our views about the intake process of such matters.

Investigations by EPAC

A matter allocated for investigation is one that meets EPAC's threshold of potential misconduct (see the definition of "misconduct" in Chapter 1) and will be investigated by one of EPAC's Investigators. As has been stated earlier, the definition of misconduct is quite vague and imprecise and liable to be interpreted in different ways by different intake offices.

Breaking down the numbers at pre-allocation in the PIT

We asked EPAC for figures on the number of matters that have come into EPAC over the last year, so as to get an appreciation of intake and allocation workloads.

- As at May 2018 there were 166 matters at pre-allocation.
- As at November 2018 there were 139 at pre-allocation in the PIT.
- As at the start of June 2019 there were 169 matters at pre-allocation in the PIT.

These figures, in our view, demonstrate that over the last year the number of matters at pre-allocation has remained quite constant. Since the commencement of the PIT on 15 October 2018, a total of 1964 new matters have been registered on *Resolve*. Those investigators currently rostered in the PIT handle on average 7 matters each per day that require recording of information, requests for further information, and assessment of whether or not an investigation is warranted.

At a bare minimum, it would take a number of hours to complete a new referral in PIT, taking into account the time required on the phone with the informant, any follow-up phone calls or liaison with schools, completion of data entry on *Resolve*, and the completion of the preliminary assessment of whether the matter merits investigation. If the matter is high-risk and requires immediate action to remove an employee from the workplace, then further time is spent liaising with relevant managers and preparing the necessary paperwork for either alternative duties for a permanent employee or placing a temporary employee on the NTBE list.

All high-risk matters are actioned while in the intake phase, and these matters are generally assessed for investigation in one day. An analysis of data from *Resolve* indicates that the average time a matter is in the intake phase is 10 days (from date of receipt of the information to the matter being assessed by a DPI). This is unacceptably long. There is a requirement under the *Ombudsman Act* that all reportable allegations are referred to the NSW Ombudsman within 30 days of receipt of the allegation.

EPAC has been advised that with the transfer of the reportable conduct scheme from the NSW Ombudsman to the OCG, the referral of reportable conduct allegations will be required to be completed by EPAC within 7 days.

Threshold for intake

The decision whether or not to initiate an investigation by EPAC is a particularly important one. The initiation of an investigation of potential misconduct has considerable consequences for an employee of the Department. It may result in interim risk management measures, such as suspension or removal from the workplace to perform alternative duties. Although strict privacy measures are taken in an attempt to protect reputations, we are aware that the existence of an investigation often becomes general knowledge in a school. It is vital that the decision to initiate an investigation is made on solid grounds and with careful consideration.

At present, decisions as to whether allegations should be investigated are made by the Duty Director of PIT at a daily Allocations Committee meeting. The Review was told by EPAC that the reasons for each allocation decision are documented in *Resolve*. EPAC states that the Allocations Committee meetings are open to all interested staff and that investigators are encouraged to attend at least four meetings a year. The primary source of guidance for this decision is the policy document *Allegations against Employees in the area of Child Protection*. In addition, there is the document *Procedures for the Local Management of less serious allegations in the area of child protection against department employees*.

In matters of a child protection nature, where the allegations are considered low-level and are exempt from reporting to the Ombudsman under the *class or kind agreement* with his office, and there is no other concern such as a breach of a previous direction, then the matter can be referred for Local Management. According to EPAC, these matters are generally dealt with very quickly. EPAC told us that the typical turn-around time for such matters is two weeks.

The Department's SO&P Division have said that there needs to be enhanced transparency about the intake process or about how decisions are made, and formal review mechanism when Principals and DELs disagree with EPAC's determination. This is primarily because there is a belief amongst DELs and Principals that the threshold for the uptake of cases by EPAC investigators is too high and does not take account for the impact of challenging staff on the day-to-day operations of school(s). Further, there is a belief that this threshold is perceived as being driven by the workload of EPAC, rather than the wellbeing of staff and students or the operational needs of schools. There have been numerous cases where Principals and DELs have reported that employee misconduct has had a dramatic impact on a school environment, and yet EPAC investigators have stated that the employee's misconduct does not meet their requirements for investigation.

SO&P has submitted that consideration be given to the inclusion of operational school-based employees in the decision-making processes in determining whether a case is investigated by EPAC, or not. If implemented, this would result in Principals (Primary, Secondary and SSP) taking part in the work of the daily Allocations Committee meeting. We see this as creating considerable problems of coordination and impinging upon the independence of EPAC.

EPAC has said that given sufficient resources, they could potentially undertake the investigation of lower-level matters. However, the risk of this would be that the day-to-day management of school staff would be elevated to a higher level of seriousness and managed from afar rather than by on the spot line managers. An independent investigation by EPAC is not an effective mechanism to address disruptive behaviour which should be addressed quickly and efficiently by the school manager. In some circumstances where EPAC has opened investigations into the conduct of challenging staff, the investigation has revealed dysfunctional behaviour within the school rather than misconduct. If EPAC were to investigate such matters, the school situation would deteriorate because they were not being handled by the local manager in a timely way.

EPAC has observed that there is currently a culture amongst school managers of avoiding difficult staff management issues and trying to avoid dealing with them by magnifying the complaints so they will reach the threshold of misconduct and thereby cause an investigation by EPAC. EPAC submits that DELs and Principals should not distance themselves from their responsibility to ensure compliance by staff with good and professional behaviour in the workplace.

Understanding the threshold for intake

EPAC has developed a number of tools and resources to assist informants to ascertain whether or not their complaint amounts to misconduct and/or reportable conduct, or whether the complaint is a matter that should be managed by local managers, or whether the complaint is in reality a performance issue that should be directed to SECT.

One of the tools introduced was the online reporting form, which was introduced on the Department's website in response to Principals who wanted the option of making a report using an online form. The other primary resources are the EPAC *Decision Tree*, the *Complaints Decision Tree* and the *Performance Decision Tree*.

The EPAC DecisionTree refers to the completion of an online form to report matters that are lower level and not reportable conduct under the Ombudsman Act.

EPAC says that when the Decision Trees were introduced it provided training and information to relevant stakeholders, and that documents on the intranet encouraged stakeholders to work through the Decision Trees using the online form where appropriate.

The Decision Tree

The Intake Working Group which developed the EPAC Decision Tree and associated resources were comprised of staff from the EPAC investigation teams and SECT. The EPAC Decision Tree was developed to assist stakeholders in determining the nature of their complaints. The tree asks a number of questions and directs stakeholders to the appropriate section of EPAC, whether it be PIT, SECT or FACT. The tree provides information as to what complaints should be referred immediately to the PIT and what complaints are suitable to

be forwarded to the PIT via the online form. EPAC prefer stakeholders to use the Decision Tree before contacting EPAC, with the aim of preserving EPAC's resources for matters that represent its core business.

The Review received a number of submissions from stakeholders that the EPAC Decision Tree on the intranet provides little support to enable Principals and DELs to know what to do about complaints of misconduct. For example, the NSWPPA has submitted that:

“The decision tree is ineffective as it is a merely a flowchart offering limited support. NSWPPA was not consulted about the formulation of this resource. [We recommend that] EPAC view the Legal Services Family Law Decision Trees as a standard for resource design.”

EPAC employees themselves have received feedback from Principals that the Decision Trees are not overly helpful and that they would much prefer advice from a live person.

In early 2019, EPAC hired a Principal Project Officer (PPO) who identified a need to review and revise EPAC's online resources to increase school staff engagement with those resources. This included: updating EPAC's decision trees so that they are interactive. The Review has been told that EPAC is keen to progress these activities. EPAC believes that an interactive Decision Tree would be an excellent resource and certainly something that should be considered if resourcing was available for its development.

Online form

The EPAC decision Tree directs informants that the online form can be used for code of conduct violations, breaches of policy and guidelines, and low-level child protection allegations. All reportable conduct allegations require an immediate phone call.

The online form is used as a way to prioritise and triage incoming complaints. If the informant reports the matter using the online form, the intake officer actions it within a day or so. EPAC has found that the quality of the information provided on the online form is varied. Many online submissions require phone calls to the informant for additional information. The form is not used at all if the informant calls in by phone. The information obtained during the intake call is entered directly into *Resolve*.

In cases where the online form has been completed, EPAC administrative officers and/or the PIT intake officer manually enters the information from the form into *Resolve*.

Policy and procedures for the PIT

We have assessed the role that PIT plays in gathering, recording and assessing allegations of misconduct as critical to EPAC achieving good outcomes. A well-resourced, well trained and robust PIT is an essential element of an efficient, consistent and professional investigations unit.

EPAC says that the guidelines for the PIT staff are contained in a number of policies and procedures, as well as legislation, including the *Ombudsman Act* and its associated facts sheets. The policies and procedures include:

- Duty Officer and Duty Principal Investigator Responsibilities document
- NSW Ombudsman Facts Sheets on Reportable Conduct
- The Ombudsman’s Class or Kind Agreement
- The Department’s Code of Conduct
- Guidelines for the Management of Conduct and Performance

However, the Review has been informed by EPAC sources that there is a minimal amount of reference to policies and procedures in the decision-making by members of the PIT. For example, how does an officer in the PIT assess whether an incoming call has reached the threshold of misconduct? How does an officer in the PIT assess whether or not an allegation is of a low level to justify local management? We believe that in the absence of properly developed policies, procedures and guidelines, and in the absence of a database of previous cases, decisions are made by PIT intake officers on an ad hoc basis based upon their own personal assessment of each matter, and without the guidance that should come from a lengthy history of EPAC’s previous investigations.

There is a lack of guidance and established policies and procedures to assist officers in the PIT to make these important decisions. We are of the view that the absence of guidelines, policies and procedures on whether or not alleged facts amount to misconduct affects not only the PIT, but indeed all investigators, managers and decision-makers in EPAC. In our view, this is why there have been many submissions made to the Review that the decisions of EPAC are arbitrary and inconsistent.

We are of the view that there is an urgent need for a more precise definition of “misconduct” and an equally urgent need for a database of decisions in previous cases so that investigators can compare them to the case at hand. There is absolutely no reason why a more precise definition of misconduct and an anonymized public database of previous cases could not be easily created by EPAC. This would go a long way to demonstrating that EPAC’s decisions are both consistent and based upon established and clearly enunciated policies and procedures.

ANALYSIS AND RECOMMENDATIONS

The three streams of EPAC matters: Enquiries, local management, and misconduct investigations

There are presently three different streams of matters that are reported to EPAC: “Enquiries”, which are allegations of misbehaviour at the lowest level that are suitable to be resolved by local managers; “Local Management” (LM) matters, being low-level child protection matters that are remitted by EPAC to local school managers for investigation

under the supervision of EPAC, but decision-making is by EPAC Directors; and investigations, in which EPAC investigates and makes decisions regarding allegations of misconduct.

It strikes us that this structure has the potential to lead to considerable confusion amongst DELs and Principals, and even to intake officers in the PIT as to what matters reach EPAC's threshold of misconduct warranting investigation. EPAC devotes much of its resources to responding to Enquiries. We are of the view that the resources of professional investigative body like EPAC should focus mainly on the more serious category of misconduct that warrants intensive and highly resourced investigations.

We are of the view that one of the important functions of DELs is to assist school Principals with the management of minor misbehaviour by school staff. We believe that EPAC should be relieved from assisting Principals with low-level misbehaviour by school staff that does not potentially meet the criteria for misconduct. On the other hand, we think that if a matter potentially warrants a finding of misconduct, it should be investigated by EPAC rather than by local managers.

We therefore suggest that there should be a more streamlined approach by EPAC to the categorisation of cases of alleged misconduct or misbehaviour. We suggest that there should be only two categories of cases:

- "Enquiries" (for investigation and resolution by local school managers)
- Allegations of misconduct warranting investigation by EPAC.

This approach would involve the abolition of "Local Management" matters that are investigated by school managers or DELs but oversighted by EPAC and remitted back to EPAC for determination of the finding and disciplinary or remedial action.

In conference with us, the EPAC Executive Director agreed with this approach. However, any such change would require negotiation with the OCG who will take over the reportable conduct scheme from 1 July 2019. It appears to us that this is an opportunity for EPAC and the OCG to come together to address some of these issues.

We discuss Local Management of allegations further in Chapter 8.

We note in passing that initial details of information provided by phone to an intake officer in PIT is recorded on a "PIT Form". If this ends up being only an enquiry of a general nature, it will be transferred to the *Contact* database. It is only if a matter is categorised as suitable for EPAC investigation in the Allocations Committee meeting that the details are entered in the *Resolve* database. We are of the view that this is an inefficient method of recording information and that *Resolve* should be engineered so that all information and enquiries can be entered on it.

The initiation of investigations

The decision to initiate an investigation of misconduct is a particularly significant one. It has the potential to result in the PSOA being suspended or allocated to alternative duties. In many cases, despite everyone's efforts to maintain confidentiality, school communities learn or hear rumors about investigations of misconduct. The decision to commence an investigation therefore has a huge potential impact on the reputation and livelihood of employees. We have been informed that decision-making about the initiation of investigations lacks consistency. It would appear that at the moment the decision to initiate an investigation of misconduct is made by the PIT Duty Director. We are of the view that it is undesirable for such an important decision to be made by a single person, and that the following procedures should apply:

- i. If there is a prospect that an investigation may be commenced, there should be extensive discussion and consultation between the PIT intake officer and the PIT Principal Investigator.
- ii. If the PIT intake officer and Principal Investigator agree that an investigation should commence, then that process will begin.
- iii. If the PIT intake officer and the Principal Investigator are not in agreement, then the matter will be remitted to the PIT Director for decision.

Towards a new definition of misconduct

In order to assist intake officers in the PIT to decide whether new matters are worthy of investigation by EPAC or whether they should be considered as Enquiries and remitted to local managers it is, in our view, essential to have a more specific definition of "misconduct". It is the potential for a finding of misconduct that enlivens an investigation by EPAC, as opposed to remitting an enquiry back to the local manager. A more specific definition of misconduct would also assist investigators and decision-makers. We consider more closely the redefining of misconduct in Chapter 7.

Classification of EPAC investigations

At the present time we understand that there is no attempt made at the intake stage to categorise matters as being simple, median or complex. We also understand that matters are allocated to investigators with little assessment of complexity. We suggest that it would be much more efficient, and result in a much fairer allocation of workload, for an initial assessment of complexity of the matter to be made by intake officers.

Allegations received for investigation by EPAC should be categorised into one of three different categories (e.g.: simple, median, complex). This categorisation will enable the setting of benchmark timeframes for the completion of each category (e.g.: three months, six months, nine months). This will also enable EPAC to provide to the PSOA in the letter of notification an initial estimate of the likely timeframe to complete the investigation into their

allegations. Every effort should then be made to adhere to that timeframe. Obviously, where there are extensive and unavoidable delays, due to parallel police or FACS investigations or due to illness of the PSOA, such timeframes would need to be amended.

A database of previous cases

We were surprised to learn that there is no EPAC database of previous cases and decisions. Such a database would be of considerable assistance to intake officers in deciding whether or not allegations may amount to misconduct, and hence whether or not a matter is worthy of investigation by EPAC, or whether it should be remitted back to local managers. No matter how much effort one goes to in attempting to define misconduct, there is nothing more helpful than being able to refer to a database of previous decisions on that topic.

This issue is discussed at some length in Chapter 7.

Efficiency of the Preliminary Intake Team (PIT)

The creation of the PIT has been an excellent innovation and one wonders why it wasn't adopted much earlier. As recommended in a previous chapter, the PIT should be staffed by full-time dedicated officers, rather than investigators on rotation from investigation teams. An analysis of data from *Resolve* indicates that the average time a matter is in the intake phase is 10 days (from date of receipt of the information to the matter being assessed and assigned to an investigation team). This is unacceptably long. Most matters should be able to be assigned within three days of receipt. Decisions in PIT need to be made in a more timely manner. With proper resourcing, this should not be difficult.

Record of low-level misbehaviour

We have received a number of submissions from stakeholder organisations that low-level disciplinary measures by local managers, including actions under the "Fair Warning, Fair Action" policy, are not recorded in any central Departmental records. EPAC does not keep a record on *Resolve* of the outcome of low-level misbehaviour Enquiries that it receives. Indeed, centralised Departmental records do not keep account of such details on the personnel files of employees. This means that if there are multiple Enquiry matters involving the one employee, neither EPAC nor the Department has a record of that person's conduct or performance history, unless it has escalated into an investigation of misconduct. In the event of a subsequent allegation of misconduct, EPAC has no way of accessing any record of previous low-level misbehaviour. This may make it difficult to assess the significance of any subsequent misconduct.

We consider that DELs and Principals should be required to advise the Department of the outcome of an Enquiry matter that has been reported to EPAC, and this should be recorded on the employee's personnel file, so that there is a complete and central record of the

conduct of the employees concerned. This may go some way to ensuring that EPAC has access to records of any persistent and accumulating misbehaviour by employees.

RECOMMENDATIONS:

1. We recommend that the staff of the EPAC Preliminary Intake Team (PIT) should be designated PIT employees rather than investigators on rotation. This would mean the appointment of a full-time Director, Principal Investigator and investigators to the PIT. These steps should result in the vast majority of new cases being assessed and allocated by PIT within three days of receipt, rather than the current 10 days. We do not agree that school representatives should play a role in the assessment of new matters.

2. We recommend that there should be a more streamlined approach to the categorisation of matters reported to EPAC. We recommend that instead of the current three categories, there should be only two:

- “Enquiries” (for investigation and management by local school managers);
- Allegations of misconduct warranting investigation by EPAC.

This would involve the abolition of “Local Management” matters that are currently investigated by school Principals or DELs but overlooked by EPAC and remitted back to EPAC for a finding and remedial action. This will require negotiating with the Office of the Children’s Guardian when it takes over the reportable conduct scheme on 1 July 2019.

3. The decision to initiate an investigation is a particularly important one that can have serious consequences for employees. At present, the decision to initiate an investigation is generally made by a PIT Duty Director (who is also a Director of a team of investigators). We recommend that the decision to initiate an investigation should only be made as follows:

- Both the intake officer who receives the original intake report and the Principal Investigator in PIT agree that the threshold for investigation has been reached
- In the event of a dispute between these two, the Director of the PIT should make the decision.

We do not agree that school representatives should play a role in the assessment of new matters.

4. At the present time, initial details of information provided by phone to an intake officer in the PIT is recorded on a “PIT Form”. If the matter is merely an enquiry of a general nature, it is entered in the *Contact* database. If it is considered an Enquiry, it is entered into the *Resolve* database. If it is considered suitable for Local Management, it is entered into the *Resolve* database. If a matter is categorised as suitable for an EPAC investigation, the details are entered in the *Resolve* database. We are of the view that the use of the PIT form is inefficient. We recommend that all information brought to the attention of EPAC should be entered directly into the *Resolve* database. If necessary, *Resolve* should be engineered so that all information and enquiries can be entered onto it.

5. Complaints accepted for investigation by EPAC should be categorised by an intake officer into one of three different categories (e.g.: simple, median, complex). This sort of categorisation will enable the setting of benchmark timeframes for the completion of each category (e.g.: 3 months, 6 months, 9 months). This will also enable EPAC to provide to the PSOA in the initial letter of notification an estimate of the likely timeframe to complete the investigation of allegations against them. Every effort should then be made to adhere to that timeframe. Obviously, where there are extensive and unavoidable delays, due to parallel police or FACS investigations or due to illness of the PSOA, such timeframes would need to be amended.
6. We agree that the online Decision Tree is a useful innovation, however it would be used much more frequently if it was an interactive program. We encourage the Department to fund the creation of such a program. The online form could also be made more user-friendly to prompt the kind of information that is required for EPAC to make a full and proper assessment of whether an investigation should take place. There is a great need for ongoing education of Principals and DELs in the lodging of allegations of misconduct with EPAC and the management of low-level misbehaviour by local managers. This is discussed further in Chapter 8.
7. The Department should keep centralised records of those lower-level misbehaviour allegations that have been the subject of 'Enquiries' to EPAC that have been sent back to local managers for investigation and resolution. In this way, these matters can be taken into account in the event of repeated misbehaviour or in the event of a subsequent allegation of misconduct.

CHAPTER 7

CONDUCT OF INVESTIGATIONS

Timeliness

It is very clear from numerous submissions that we have received that the most serious complaints about the EPAC Directorate concern the length of time taken to conduct investigations and arrive at decisions. Those submissions have come from stakeholder organisations, former PSOAs, former alleged victims (and their families), and even from former and current employees of EPAC. They uniformly assert the unacceptability of delays of 1-2 years or more, with little or no explanation to stakeholders from EPAC. EPAC itself has admitted to the unacceptability of these lengthy delays and, over the last 12 months, has attempted to overcome the worst cases of delay. This Reviewer, however, is of the belief that the current situation of EPAC still results in unacceptable delays, despite the continuing efforts of EPAC investigators and Managers.

A typical individual submission to the Review was this:

“I was left for long periods of time without any communication from anyone at EPAC, despite me regularly emailing and phoning. The NSW Teachers Federation sent a letter on my behalf and the reply was that it would be made a priority to process my complaint. After this letter another 12 months went by. Another letter was sent after 12 months had lapsed with no action.”

The Teachers Federation summed up the effect of delay on PSOAs as follows:

“High demand or high staff turnover have often been inadequate to manage the workload resulting in unacceptable delays, teachers in permanent positions cannot be returned to their substantive position or, alternatively, the position cannot be filled, until the conclusion of the investigation.”

Excessive delay has a flow-on effect on procedural fairness. As New Law Pty Ltd has observed:

“It is not uncommon for an officer to see material relevant to an investigation and lament that if the investigation had been conducted more expeditiously, other evidence may well have been available to support them and the case they wished to put forward.”

It is in no one's interest for there to be excessive delay. When investigations take an unwieldy length of time, persons who may have witnessed events become increasingly vague in their recollection, and material which might have been relevant and available shortly after the event may become impossible, or extremely difficult, to obtain.

Time begins to run from the date of receipt of an allegation when the case is opened on *Resolve*. Investigators genuinely try to complete matters in a timely matter. However, given the sheer volume of matters, and the complex tasks sometimes involved in conducting and completing an investigation, matters are often not completed in a timely fashion.

In some cases, the NSW Police Force and/or the Department of Family and Community Services (FACS) conduct their own enquiries and request EPAC not to take any action which may alert the employee to an investigation taking place. EPAC almost always complies with such requests, although there are some cases where a continuing unacceptable risk to students requires EPAC to take urgent, interim measures to remove an employee from the workplace. In such cases, EPAC will seek the advice of NSW Police or FACS about how it proposes to manage such risk. In most cases where there is a Police or FACS investigation, EPAC will place their own investigation 'on hold' pending advice that the Police or FACS investigation has been completed and that the Department's investigation may now commence. According to EPAC, at any one time around 10% of matters being investigated by EPAC are 'on hold' due to parallel investigations by police or FACS or illness of the PSOA.

Investigations are sometimes paused when the PSOA has serious health issues. EPAC does not have reliable data on the extent that sick leave impacts on the progress of investigations. When a PSOA becomes ill, EPAC has little control over the future course of the investigation. However, EPAC works closely with the Department's Health and Safety Directorate to address issues when sick leave significantly impacts on the progress of an investigation. There have been discussions between HR and relevant unions to develop policies and processes for ensuring that sick leave does not act as an impediment to the completion of an EPAC investigation

EPAC has identified the following factors as frequent impediments to more speedy completion of investigations:

- Availability of witnesses – interviews with student witnesses need to be conducted around their academic and other commitments and the availability of their parents or other support persons.
- Criminal proceedings pending.
- Availability of evidence from other agencies – while information sharing provisions have been established with relevant agencies, the process of obtaining that information can be time-consuming.
- Delays in the PSOA providing their response to the allegation (all reasonable requests for extensions of time are granted).
- Re-allocation of an investigation to another investigator due to staff turnover/leave at EPAC.
- Investigators having caseloads of more than 15 matters – EPAC has found that once this caseload limit has been reached there are significant effects on timeliness.

EPAC submitted to the Review that the Executive Director (ED) raises any issues of undue delay with the relevant EPAC team Director for their management. However, numerous

stakeholders have said that complaints of extensive delays have often been met with silence from EPAC or with letters containing little or no real information. We believe, from all the information provided to us, that when the ED receives a complaint from a stakeholder that a matter is taking too long, she will direct an email to either the team Director or the Investigator enquiring where the matter is up to, so that she can respond to the stakeholder. However, the reply to the stakeholder is often a letter merely saying that the investigation is progressing or that a Report is being prepared.

EPAC also submitted to the Review that since late 2018 the EPAC Director, Systems and Practice reviews the progress of all delayed matters every month and holds a monthly “call over” meeting of these and any other high risk matters with the ED, and then feeds back to the team Directors to discuss any action that may need to take place. We have been informed that this “call over” merely consists of an email advice to the ED informing her of matters that are stale. We do not accept that this is an adequate response to the critical issue of extensive delays.

The reality is that extensive delays are commonplace in EPAC and that adequate communication about the slow progress of an investigation often does not occur until the Teachers Federation or its members contact the investigator concerned or the ED of EPAC.

EPAC acknowledges that there have been significant delays in many EPAC investigations. EPAC agrees that the responsibility for keeping stakeholders updated as to the progress of investigation lies with the investigator. EPAC does not dispute that communication with stakeholders is given a lower priority when caseloads are high. EPAC acknowledges that this has a significant effect on the stakeholders involved, particularly the PSOAs. However, EPAC asserts that if a person emails or phones, EPAC will respond. EPAC was unaware of situations in which they had failed to respond to telephone requests for information about the progress of investigations. It should be noted that some PSOAs, alleged victims and Principals find it aggravating and a waste of their time to be given an update that merely says that no further progress has been made in an investigation.

In the last 12 months EPAC claims that it has reduced the proportion of investigations that are over 12 months old from 44% to 17%, by maintaining a strong focus on completing old matters using additional resources provided by the Department. However, in June 2018 EPAC still had 51 investigations that were more than 24 months old! At the time of making its written submission to this Review in March 2019, EPAC had only 11 investigations that were more than 24 months old. This is a considerable improvement. Most of these matters have been placed on hold because of parallel investigations by police, parallel criminal proceedings, or serious health issues of the PSOAs.

Our concern about the extent of old matters is reinforced by EPAC statistics that show that so far in 2019, 35% of matters completed were more than 12 months old and 17% of current active files are more than 12 months old. In our view this demonstrates that EPAC still has a significant issue of timeliness, despite efforts to overcome this problem.

New Law Pty Ltd (New Law) has submitted that the unknown waiting times are what create the most stress for persons caught in the system. New Law directed the Review to a

framework that exists in the Queensland Public Service known as CaPE (Conduct and Performance Excellence). The Queensland Public Service has adopted a CaPE case categorisation for cases of inappropriate conduct and poor performance. There are three categories of cases, from the least serious to the most serious. There are benchmarks whereby relevant State agencies are expected to resolve 75% of matters within particular times. So far as we are aware, New South Wales has no equivalent timeframes.

Such a framework might assist officers facing allegations of misconduct to have an understanding of how long it might take for their matter to be resolved. To achieve such timeframes would require adequate staffing of EPAC (which has been discussed in Chapter 5).

Procedural fairness issues

To properly understand issues surrounding procedural fairness, it is necessary to outline what are the normal processes in an investigation. The table below outlines the steps in the process of a typical EPAC investigation.

The investigative process

<p>Letter of notification</p>	<p>The first contact with the PSOA is a brief letter of notification that an allegation has been lodged.</p> <p>The letter contains very little detail, because in most cases not enough is known at that stage. Generally, the investigator has not yet interviewed the victim or witnesses. The decision to investigate has been made based on hearsay information from school managers or sometimes short written versions provided by alleged victims and witnesses.</p> <p>In a minority of matters that are simple and straightforward, minimal investigation is required and so a combined letter of notification and the allegation is sent at this early stage.</p> <p>The letter of notification may be sent days, weeks or even occasionally up to 3 months or so after an allegation has been made.</p> <p>A delay in notification may be because of:</p> <ul style="list-style-type: none"> • workloads; • it's a Friday (the policy is that EPAC is not to give "bad news" on a Friday);
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	<ul style="list-style-type: none"> • for strategic reasons (Police or FACS might ask EPAC not to notify the PSOA); • it might be more appropriate to gather the evidence before the PSOA is alerted to the investigation because of a risk of evidence being tampered with or destroyed or a risk of witnesses being influenced. <p>Risk management action generally occurs at the notification stage. Risk management is usually in the form of:</p> <ul style="list-style-type: none"> • a written direction to the PSOA not to engage in certain conduct; • placement of the PSOA on alternative duties (if a permanent employee), • termination of contract and temporary placement on the NTBE list (if temporary or casual employee) • Suspension (with or without pay) is rare. <p>Risk is continually assessed as the evidence is gathered. It may be that risk management strategies are implemented part-way through an investigation.</p> <p>Following the letter of notification, PSOAs should receive update letters every 18 weeks, however, the Review has been told by PSOAs and EPAC staff that at times EPAC has been very lax in doing this.</p>
Witnesses are interviewed	<p>Face-to-face interviews of the alleged victim and witnesses are held in isolation from other witnesses. A recording is generally made of face-to-face interviews, and sometimes a transcript is prepared. In some lower risk matters, the investigator may prepare a synopsis of the interview. Witnesses are able to have a support person with them (in the case of students this is often their parent or guardian, or in some cases a trusted teacher selected by the student). If children are formally interviewed, the permission of their parents is first obtained.</p> <p>In some circumstances witnesses and other parties may be interviewed by telephone or video conference. In most cases, a recording will be made with the knowledge of the person interviewed.</p>

	<p>At interview, investigators obtain a commitment from the witness not to discuss the matter with any person other than their Principal or their support person.</p> <p>EPAC’s best practice suggests that two investigators should be present when interviewing alleged victims, witnesses, or PSOAs. We were told by EPAC that best practice is embedded in interview training provided to investigators and reinforced by team Directors. Investigators new to EPAC are accompanied by a more experienced investigator when conducting all interviews. Interviews in complex matters are usually conducted with two investigators. When a PSOA responds to allegations via interview, two Investigators are generally present.</p> <p>Various factors have impacted on the ability to implement this best practice, such as increased work loads of investigators and the time required to travel to regional and remote areas.</p> <p>Statements may be prepared by EPAC for the witness to sign following an interview even when an electronic record is made. If a statement is prepared, a copy will be offered to the witness.</p> <p>Recordings, transcriptions and synopses are kept on <i>Resolve</i>. If the interviewee requests a copy, this is provided on disc. If a written statement is made, it will be sent back to the witness for verification.</p> <p>At the beginning of an interview with a child or young person the investigator establishes their understanding of an obligation to tell the truth. At the conclusion of an interview, the interviewee is asked if they have told the truth.</p>
Collection and analysis of evidence	<p>Documentary evidence, such as photographs, emails and workplace or Departmental records may be obtained. The Department may seek relevant information from other agencies, including FACS and NSW Police. A site inspection may be carried out.</p> <p>Expert evidence such as technical and forensic advice may be obtained.</p>

	<p>Investigators are encouraged to test facts presented by interviewees. Striking similarities in versions (oral or written) are identified and analysed in reports. Discussions with the Principal (where they are not the PSOA) can shed light on possible collusion between interviewees.</p>
<p>Letter of allegation(s) to the employee</p>	<p>The next notification to the PSOA is a letter of allegation, which might be 3, 6, or 12 months after the initial notification letter. This is the first time that full details of the allegations are provided to the PSOA.</p> <p>At the time the letter of allegation is sent the gathering of evidence has been completed. The letter of allegation sets out the precise allegations of misconduct and provides the PSOA with an opportunity to respond – either in writing or at interview. The PSOA does not have any obligation to respond, however most of them do respond, generally in writing.</p> <p>Sometimes EPAC will reference details of the evidence in the letter of allegations and/or attach relevant copies. For example, in matters concerning alleged inappropriate messages or false statements on timesheets these will be attached to the letter of allegation.</p> <p>In some cases, when there is insufficient evidence to warrant putting allegations to an employee, EPAC may discontinue the investigation.</p>
<p>Response from the PSOA</p>	<p>In the vast majority of cases, the PSOA responds in writing. The Teachers Federation advise their members not to agree to a face-to-face interview. Where a written response is provided to EPAC, this has generally been vetted by the union or its lawyers.</p> <p>In a minority of cases the employee agrees to be interviewed. In this case a suitable location for the interview will be negotiated, having regard to privacy, confidentiality and creating minimal disruptions to schools.</p> <p>At interview, the PSOA may choose to have a support person present. In every case, with the</p>

	<p>consent of the employee an electronic record of the interview is made and a transcript prepared.</p> <p>If the PSOA provides evidence at the interview that is clearly at odds with the bulk of the evidence already gathered, the investigator will ask questions to clarify and challenge the PSOA. The investigator will show relevant documents (eg, emails, signatures, photos, et cetera) to the PSOA. Any documents that are shown to the PSOA will be clearly identified and preserved.</p> <p>The employee will be offered an electronic copy of the record of interview.</p>
Investigators report	<p>If the employee does not respond to the written allegations it will be deemed that the employee has denied the allegations.</p> <p>The investigator prepares an investigation report. In the report, the investigator summarises and analyses the evidence, including the response from the PSOA.</p> <p>The investigator then makes recommendations about:</p> <ul style="list-style-type: none"> • whether the alleged conduct can be sustained; • whether the alleged conduct reaches the threshold for misconduct; • whether the alleged conduct amounts to reportable conduct; and • whether the alleged conduct is notifiable to the OCG. <p>The report is then endorsed by the Investigator’s team Director. In years past, the team Director would indicate on the report whether or not he or she agrees with the recommendations made by the investigator. However, the Review has been informed that in recent times the ED of EPAC has discouraged any difference of opinion between the investigator and the team Director. This is commented on below.</p>
Initial decision making	<p>If the investigator thinks the appropriate action will not exceed a caution and reprimand it goes to a</p>

	<p>team Director for decision. Otherwise it goes to the ED for a decision.</p> <p>The decision maker (Executive Director or a team Director) reads the investigator’s report (and the attached evidence) and makes a preliminary written finding whether or not misconduct has been established. If the finding is that misconduct has not occurred, then the decision-maker can only take remedial action. If the decision-maker decides that misconduct has occurred, the decision maker then requests “additional information” from the investigator about the PSOAs previous history. Armed with this information, the decision maker then decides what is the maximum disciplinary action that could be taken against the PSOAs as a result of the finding of misconduct.</p>
<p>Notification of a preliminary decision and seeking a further response from the PSOAs</p>	<p>Having made a preliminary decision that misconduct has occurred, the decision-maker (either the ED or team Director) writes again to the PSOAs informing him or her that a preliminary decision has been made that misconduct has occurred and listing the most serious possible disciplinary action that he or she has in mind to impose on the PSOAs.</p> <p>If the PSOAs is a permanent employee this letter sets out the preliminary findings and advises the PSOAs of the proposed action. The PSOAs is then given 14 days to respond to the misconduct finding and the proposed action. They can respond in writing, via interview or not at all. At this time, permanent employees are provided with a complete copy of the investigation report, annexures and the written findings.</p> <p>If the PSOAs is a temporary or casual employee, they are not entitled to a copy of the evidence upon which the decision maker relies, including the investigation report and underlying material. We have been informed, however, that generally the ED will afford the employee procedural fairness by providing to them her preliminary findings, the investigation report and the associated evidence.</p> <p>In circumstances where the allegations are not sustained, the PSOAs does not receive a copy of the</p>

	<p>documents, however, may apply to access them via GIPA.</p> <p>If the investigation is being treated as a Public Interest Disclosure (PID) matter, all details that may identify the discloser will be redacted.</p>
Final decision	<p>After a response is received from the PSOA, or if no response is received, the decision maker makes a final decision. At times the decision maker changes their mind, based on the PSOA's submissions. The PSOA then receives a final letter notifying him/her of the final decision as to findings of misconduct and disciplinary action.</p> <p>If the PSOA is not a permanent employee, the decision maker's only options are: permanent placement on the NTBE list; remedial action (such as conditional casual approval, monitoring, directions and/or a warning). The other disciplinary actions do not apply.</p>
Notifications	<p>Where there is a finding of sexual misconduct or serious physical assault, those findings are reported to the OCG.</p> <p>Further notifications, where appropriate, are made to the Ombudsman's Office and NESAs.</p>

Submissions on the processes of misconduct investigations

The following submissions were made to the Review about the processes outlined above. These submissions were put to EPAC for a response.

The time between letters of notification and letters of allegations:

1. The letter of notification is very brief and often lacks specificity as to the nature of the complaints that have been made to the point that the PSOA is unable to know what is being investigated until they receive the letter of allegation many months later. By this time, memories have faded, and documents may have been lost, deleted or destroyed.

Officers of the Teachers Federation have noted that in some cases a letter of notification has not been sent to their members, so that the first information received by a member that an investigation is on foot is when they are presented with the letter containing specific allegations.

Response from EPAC:

We sought a response from EPAC concerning the allegation that letters of allegation are being sent to PSOs too long after the initial receipt of allegations by EPAC. We requested that EPAC inform us what was the average time between receipt of allegations and notification of allegations to the PSO over the last three years. EPAC was able to obtain this information from its database. As a random sample, EPAC selected every tenth investigation open at June 2017, June 2018 and at 28 May 2019. It then measured the interval between receiving the report of the alleged conduct and putting the allegations to the PSO, and took an average of all such matters. The resulting figures are shown in the chart below. Those figures do not take into account matters where the investigation was placed on hold because another agency, such as the police, were investigating the same matter. The average time intervals between receipt of the report and advising the PSO of the allegations were as follows:

2017	9.5 months
2018	7.5 months
2019	6.5 months

Analysis:

Although the time interval between receipt of allegations and notification to the PSO has been reduced over the last two years, we are of the view that 6.5 months is still much too long a time. During this period, it is likely that the PSO will be under severe stress, knowing from the letter of notification that an investigation is taking place, but not knowing what the allegations are. We are of the view that the main vice of this delay is that the investigation is proceeding without the PSO having an opportunity to nominate potential witnesses or to identify potential documents or other evidence that may be relevant to the enquiry. By the time the PSO has been served with the letter of allegations, after six months most people’s memories will have faded, and this may well impact on the ability of the PSO to respond to the allegations. This is a serious issue of procedural fairness which is dealt with in our analysis below.

EPAC has submitted that one disadvantage of providing allegations to PSOs at an early stage is that it may enable the PSO to contaminate the evidence by threatening or intimidating witnesses or destroying evidence. There have been documented cases where PSOs have intimidated their colleagues or students by accusing them of “dobbing them in”. There have also been circumstances in which the employee has taken advantage of knowing the allegation at an early stage and tailoring their response to discount the evidence.

We suggest that there is a balance to be struck between the legitimate rights of PSOs to know the specifics of allegations made against them at the earliest opportunity and the legitimate interests of EPAC to investigate matters without improper interference. This balance is discussed further later in this chapter.

Presumption against the PSO (confirmation bias):

2. We have received multiple submissions that EPAC approaches allegations with a presumption against the PSO. For example, the NSWPPA has submitted that:

“The number one criticism of the practices and procedures of EPAC is their perceived presumption of guilt of a Principal or other teaching staff member, before procedural fairness has been applied.” New Law has submitted that, “At times, investigators have shown what appears to be a desire to prove the complaint which has led to the investigation.”

Response from EPAC:

EPAC’s response is that this is an assumption that is not supported by the evidence. The Review has been provided with data on the outcomes of investigations over a number of years, and this data demonstrates that a significant proportion of matters are not sustained or discontinued. EPAC officers also receive complaints from principals and parents when they are unable to sustain matters because of insufficient evidence or do not put allegations because there is not sufficient evidence of misconduct.

We are told that every investigation report is reviewed by a team Director, and those Directors are involved in reviewing the evidence with investigators, so that there are mechanisms in place to ensure that findings are based on the evidence. Reportable conduct matters are also reviewed by the NSWOO and that Office has a role to ensure the fair treatment of employees, as well as effective management of risk.

Analysis:

Our review of EPAC records has not disclosed any presumption against PSOAs. EPAC records disclose a very high incidence of matters that are not sustained, matters that are discontinued, and findings of low-level misconduct in cases where the original allegations were of high-level misconduct.

Removal of Principals from a school:

3. The NSW Secondary Principals’ Council (NSWSPC) has submitted that:

“Issues of procedural fairness also need to be considered when a Principal is removed from a school following a complaint. The fact that the complainant often remains in the school while the Principal is removed immediately suggests the Principal is at fault and allows witnesses to corroborate and build a common narrative before the investigation has been completed.... EPAC could consider adopting strategies such as a confidential site assessment to provide contextual insight and mitigate the risk of false and colluded interviews.”

EPAC says in response that very few Principals are, in fact, removed from the workplace. The EPAC ED makes a decision to remove a Principal only as a last resort because of the impact on school leadership. Such a decision is made after a risk assessment by the investigator and their team Director. This is never done without discussion with the respective DEL and/or regional ED, who is a line manager of the Principal.

As at 29 May 2019, there were only 4 Principals who had been directed to alternative duties. Three had taken sick leave rather than proceed onto alternative duties. In all cases discussions were held between the Executive Director of EPAC and the Principal’s

respective DEL and/or ED, all of whom were supportive, and indeed encouraging, of removing the Principal from the school, due to their concerns about how to manage the school if the Principal remained in the school.

Analysis:

We do not believe that there is any bias on the part of EPAC in the manner with which they deal with school Principals. We do not accept that Principals are wantonly removed from schools. We are satisfied that EPAC's management of interim risk management strategies concerning Principals is exemplary.

Issuing of a warning letter without notifying the PSOA of allegations:

4. We have received submissions to the effect that there have been misconduct matters that have been discontinued and yet a warning letter was issued to the PSOA without the PSOA having an opportunity to respond to any allegation.

EPAC says that the *Teaching Service Act* and the procedural guidelines provide different ways in which to manage conduct. Issuing a warning allows EPAC to highlight concerns that have been raised and to express the Department's expectations of employees without any finding of misconduct. EPAC submits that there is no requirement to make a finding of misconduct before issuing a warning. They claim that this is a legitimate means of dealing with low-level misbehaviour where there has been no finding of misconduct. These warnings are not placed on the employees personnel file, and hence it would not affect their advancement and progression within the Department. EPAC submits that it is an expeditious way of dealing with lower level conduct matters where an investigation would not be appropriate.

Analysis:

We agree that the issuing of letters of warning is permitted under the *Teaching Service Act*. We do not view this practice as infringing any rights of employees because it has no consequence in itself for the employee. We are not of the view that any action should be taken here.

Time limit for response from PSOA:

5. EPAC's general practice, when sending a letter of allegation, is to request a response from the PSOA within 14 days. EPAC have informed us that where applications are made to extend this time, approval is always granted. It has been submitted to us that the requirement for a response from the PSOA within 14 days of the letter of allegation is unreasonably short, especially after an investigation of 6-12 months. For example, the NSWPPA has submitted that:

"There is an obvious unfairness in an expected fortnight response timeframe the alleged wrongdoer is afforded, compared to the months and even years awaiting the allegations and action from EPAC."

EPAC's response is that the 14-day timeframe for a response to allegations or to a preliminary disciplinary decision is a benchmark for a response. Requests for extensions to respond are always granted. However, given the pressure to complete investigations, lengthy response timeframes will further extend timeframes.

We are of the view that in itself 14 days, with an option to extend on request, is not unreasonable. However, once again the issue of delay in the conduct of an investigation creates a distortion so that the 14 days becomes unreasonable. If letters of allegation were sent within a month of receipt of the allegation, a requirement for a response within 14 days would appear to be quite reasonable. We are not of the view that there should be any change to this practice, but rather that EPAC should be making a concerted effort to send letters of allegation much earlier.

Interviews with witnesses nominated by the PSOA:

6. The Teachers Federation, NSWPPA and NSWSPC have all said that witnesses identified in a PSOAs response are not always contacted by EPAC. The Teachers Federation has said that it significantly undermines confidence in the process where teachers have nominated potentially supportive witnesses in their response to allegations and the investigation report shows these witnesses were not approached for comment.

EPAC's response:

EPAC's response to this is that witnesses nominated by the PSOA that can provide evidence about the allegations will be interviewed. The PSOA's submissions are reviewed by the investigator, the team Director, and the decision maker, and that any witnesses who may clarify relevant material will be interviewed. EPAC says that generally the investigator's report will address why witnesses raised by a PSOA were not interviewed.

EPAC has informed us that in some instances the witnesses identified by a PSOA will not be interviewed because:

- They have already been canvassed and do not have any relevant information to provide
- They can only provide character evidence and cannot attest to details about the alleged conduct
- They are not in a position to provide material evidence that would alter the course of the investigation
- Where the PSOA seeks a whole class of children to be interviewed, and there has already been corroboration of the allegations from a number of those students, in the absence of compelling grounds, EPAC will not interview the other children.

In some EPAC investigations, the preliminary findings have been changed as a result of the PSOA identifying witnesses who have cast doubt on the allegations of misconduct.

Analysis:

We are of the view that, as a matter of procedural fairness, witnesses nominated by the PSOA should generally be interviewed, and that a decision not to interview them should only be made where there are compelling reasons. We are of the view that those compelling reasons should always be stated in the investigator's report. In the event of a finding of misconduct, this report is provided to the PSOA, who then has an opportunity to see the reasons why those witnesses have not been interviewed.

Should EPAC have the right to compel employees to attend an interview

7. While EPAC says that it provides opportunities to PSOA to respond and to make submissions either in person or in writing during the investigation, in almost all cases, the submissions are made in writing. This is because the Teachers Federation advises its members not to attend interviews with EPAC but to provide responses in writing. EPAC believes that it would be of significant assistance to interview the person whose conduct is under investigation. In some areas of enquiry there are powers to compel information (e.g. *Health Care Complaints Act 1993* section 34A). Like the health care complaints legislation, the child protection legislation is protective. EPAC says that evidence suggests that there would be significant improvements to the capacity to protect students if EPAC had the power to compel information from PSOAs (with protections afforded in relation to the information not being available in criminal proceedings). An alternative would be to make it a requirement under the Code of Conduct to assist an investigation by attending an interview.

Analysis:

We are not of the view that there should be any change made to compel employees to attend at interview and respond to questions from EPAC investigators. This would be a radical departure from previous practice and would cause an enormous amount of discontent amongst employees of the Department. Even in the police force, there has been recent litigation about the power to compel police officers to answer questions during disciplinary proceedings. We do not see any benefit in the Department going down this path.

Towards a new definition of “misconduct”

In our view, one of the two most important changes to be made to the documentation under which investigators and managers in EPAC conduct their work is to create a more rigorous definition of misconduct. The definition of misconduct plays a most significant role at every stage in the examination of allegations by EPAC, from the intake phase until decision-making. The current legislative definition provides very little guidance to investigators and decision-makers. As a result, there is little consistency of approach between different intake officers, investigators, EPAC teams and EPAC Directors.

Section 93C of the *Teaching Service Act* defines misconduct as conduct that would warrant disciplinary action as opposed to remedial action (see Chapter 1). This unhelpful statement defines misconduct in terms of the seriousness of the response to it. Section 93B of the *Teaching Service Act* states that “disciplinary action” means any one or more of the following:

- (a) dismissal from the Teaching Service,
- (b) directing the officer to resign, or to be allowed to resign, from the Teaching Service within a specified time,
- (c) reduction of the officer’s salary or demotion to a lower position in the Teaching Service,

- (d) the imposition of a fine,
- (e) a caution or reprimand.

As opposed to that, “remedial action” means any one or more of the following:

- (a) counselling,
- (b) training and development,
- (c) monitoring the officer’s conduct or performance,
- (d) implementing a plan addressing unsatisfactory performance,
- (e) the issuing of a warning to the officer that certain conduct is unacceptable or that the officer’s performance is not satisfactory,
- (f) transferring the officer to another position in the Teaching Service that does not involve a reduction of salary or demotion to a lower position,
- (g) any other action of a similar nature.

It will immediately be noticed that the former category includes “a caution or reprimand” whereas the latter category includes “the issuing of a warning”. There is therefore an ambiguous overlap between conduct which amounts to misconduct and that which does not. How is a PIT intake officer, an investigator, or a Director to assess the difference between conduct warranting “a caution or reprimand” as opposed to conduct warranting “the issuing of a warning”. This overlap highlights the ineffectiveness of the present definition of misconduct in the Act.

The procedural guidelines include some minor commentary on “What is misconduct?” (7.2 of the *Procedural Guidelines*) but do not provide examples of misconduct, nor do they provide any guidance on when an allegation is likely to result in disciplinary action.

The Code of Conduct sets out the standards of behaviour expected of all staff and provides some guidance as to what constitutes misconduct and what conduct is likely to result in disciplinary action.

We have looked at other jurisdictions for some guidance on what constitutes misconduct. In Queensland, the *Education (Queensland College of Teachers) Act 2005* specifies a number of grounds for the taking of disciplinary action, including “when the person behaves in a way, whether connected with the teaching profession or otherwise, that does not satisfy the standard of behaviour generally expected of a teacher” (s. 92(1)(h)).

New Zealand

In New Zealand, Rule 9 of the *Teaching Council Rules 2016* provides examples of serious misconduct, including:

- (a) using unjustified or unreasonable physical force on a child or young person or encouraging another person to do so
- (b) emotional abuse that causes harm or is likely to cause harm to a child or young person
- (c) neglecting a child or young person

- (d) failing to protect a child or young person due to negligence or misconduct, not including accidental harm
- (e) breaching professional boundaries in respect of a child or young person with whom the teacher is or was in contact as a result of the teacher's position as a teacher; for example:
 - (i) engaging in an inappropriate relationship with the child or young person:
 - (ii) engaging in, directing, or encouraging behaviour or communication of a sexual nature with, or towards, the child or young person:
- (f) viewing, accessing, creating, sharing, or possessing pornographic material while at a school or an early childhood education service, or while engaging in business relating to a school or an early childhood education service
- (g) acting dishonestly in relation to the teacher's professional role, or committing theft or fraud
- (h) being impaired by alcohol, a drug, or another substance while responsible for the care or welfare of a learner or a group of learners
- (i) permitting or acquiescing in the manufacture, cultivation, supply, offer for supply, administering, or dealing of a controlled drug or psychoactive substance by a child or young person
- (j) an act or omission that may be the subject of a prosecution for an offence punishable by imprisonment for a term of 3 months or more
- (k) an act or omission that brings, or is likely to bring, the teaching profession into disrepute.

Judicial decisions

The meaning of misconduct in the legal profession has been the subject of many judicial decisions, including –

- Priestly JA in *Quidwai v Brown [1984] 1 NSWLR 100* at 105, where his Honour held that the test for whether a practitioner had committed “misconduct in a professional respect” was whether “the practitioner was in such breach of the written or unwritten rules of the profession as would reasonably incur the strong reprobation of professional brethren of good repute.
- Dean J in *Re A Solicitor [1960] VR 617* at 622, in which his Honour held that misconduct in a professional capacity bore the same meaning as the House of Lords espoused in *Myers v Elman*, in which Viscount Maugham, when speaking of “professional misconduct” said they were words which “have been properly defined as conduct which would reasonably be regarded as disgraceful or dishonourable by solicitors of good repute and competency”.
- Mandie J in *Campbell v The Dental Board of Victoria [1999] VSC 113* at [23-24], in which his Honour said as follows, “The test to be applied is whether the conduct violates or falls short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency.”

Comment

In our view, there is great merit in providing a more precise definition of misconduct in the context of EPAC investigations. It would not be necessary for the legislation to be changed in order to remedy the vagueness of the definition of misconduct in the *Teaching Service Act*. It would be sufficient for the Department's Procedural Guidelines to further define the meaning of "misconduct" and to differentiate it from low-level "misbehaviour" which does not warrant investigation by EPAC and is suitable to be dealt with by local managers (Principals and DELs).

We have set out below in the section of this chapter titled "Analysis and recommendations" our suggestion for a new definition of misconduct.

Database of previous EPAC decisions and comparable decisions of other agencies and tribunals:

The second most important step that can assist EPAC investigators and decision-makers at every level to make good decisions and to maintain consistency of approach is for there to be developed a database of previous decisions and outcomes. This Review has revealed that there are no precedents, guidelines, judgements or typical case scenarios to provide a benchmark for decision makers, investigators or intake offices to take into account when deciding whether a matter has reached the threshold of misconduct and when deciding on the appropriate disciplinary action flowing from a finding of misconduct. This is an issue that has previously been discussed in chapter 6 in relation to the initial decision within the PIT whether or not the facts in an allegation potentially amount to misconduct, warranting an investigation.

We were surprised that EPAC has no database of previous cases and decisions, as such a database would be of great assistance at every level of investigation and decision-making, from the PIT intake officer up to the highest level of decision-making. No matter how much effort one goes to in an attempt to define misconduct, there is nothing more helpful in assessing whether or not misconduct exists in a particular case than being able to refer to a database of previous decisions on that topic.

We have consulted with the Office of the Children's Guardian (OCG), which makes extensive use of such a database when assessing whether or not to grant or withdraw approval for a Working with Children Check. These checks, like the decisions of EPAC, are important decisions that affect the careers, livelihoods and reputations of people, and therefore must be handled in the most professional manner. We have also been made aware that the Professional Standards Command (PSC) of the New South Wales Police Force make extensive use of a database of previous cases when making decisions about the outcomes of misconduct by police officers.

We can see no reason why EPAC should not have available an extensive database of the findings and disciplinary action taken in previous cases. This would provide considerable assistance to PIT officers and investigators in deciding whether to recommend a finding of misconduct and what disciplinary action to recommend. It would assist PIT officers to decide

whether or not a report potentially constitutes misconduct. It would assist decision-makers at the highest level to make consistent decisions about whether or not misconduct has occurred and what the appropriate disciplinary action should be. Such a database should be able to be created by EPAC staff, particularly the Principal Legal Officer, from records maintained by EPAC.

Panel decisions in cases of alleged serious misconduct

Until now, all decisions about allegations of misconduct where there are potentially serious repercussions for the employee, such as dismissal or a direction to resign or demotion, have been decided by the Executive Director (ED) of EPAC. From what we have been able to discern, this decision is essentially made by the ED alone, relying essentially upon the investigator's report, the EPAC team Director's endorsement and the underlying evidence in the EPAC file.

We have received many submissions from stakeholder organisations and individual submitters suggesting that such important decisions that affect the livelihood and reputations of teachers, Principals and others, should not be decided by a single person acting alone. In many professional arenas, including doctors and other health professionals, decisions of this kind are made by an independent tribunal set up by legislation. This is considered a very cumbersome and highly technical approach, and we can see the merit of the more fluid, less unwieldy approach that is taken to the disciplining of Education Department officers by internal departmental decision-making. The current system eschews the involvement of lawyers and court-like hearings where witnesses (including children) are examined and cross-examined by the parties. We are of the view that the present system, where a dedicated unit of the Department is charged with investigating allegations of misconduct and coming to decisions based upon those investigations, is a sound one that has many benefits, including the potential for timeliness.

However, we are of the view that it is an opportune time to review whether the present system of decision-making in major cases, in which the ED of EPAC makes all the decisions, should be changed.

NSW Police Force

In the New South Wales Police Force, where a police officer (or administrative officer) is the subject of a complaint of misconduct, the complaint is referred to a complaints management team (CMT) to conduct an "evidence based investigation" only where the possible outcome is "reviewable action". Reviewable action is:

- a reduction of the officer's rank, grade, or seniority
- deferral of the officer's salary increment
- any other action other than dismissal or the imposition of a fine.

All decisions pertaining to reviewable action are decided by a delegate of the Commissioner with the assistance of the CMT. Evidence based investigations are managed by a CMT to ensure compliance with all legal and policy requirements and to assist the

Commander/Manager in exercising their delegation.

The core members of the CMT are the:

- Commander/Manager
- Crime manager (or equivalent such as the Professional Standards Manager for specialist commands)
- Executive officer (or equivalent)
- Professional Standards Duty Officer (or equivalent).

CMTs may also consult local and specialist personnel as required.

The CMT must meet regularly and as often as necessary to satisfy CMT functions and the exercise of the commander's complaint delegations. CMTs that are monitoring ongoing investigations meet at least fortnightly. Minutes of each meeting are recorded. Any decision made outside a CMT meeting is recorded and confirmed at the next CMT meeting. The delegated officer must be present at CMT meetings.

OCG

In the Office of the Children's Guardian (OCG), significant decisions about Working with Children Checks are made by an individual delegate of the Guardian with the assistance of an internal panel consisting of up to 15 senior employees of the Office who hold varying roles. The OCG also has access to legislatively appointed professional advisers with whom it can consult in cases that require further expert input.

EPAC

There is presently a dual system of decision making in EPAC. Findings of misconduct and decisions about disciplinary action for misconduct are made by a single person: either the ED (in the case of conduct that could warrant dismissal, a direction to resign or demotion) or one of the EPAC team Directors (who until recently only had the power to issue a caution or reprimand). This system commenced with changed delegations in late 2017, due to the pressure of work on the ED who had previously been the sole decision maker in most misconduct matters. In 2017 the team Directors received delegations to make disciplinary decisions with respect to misconduct where the appropriate disciplinary action was no higher than a caution and reprimand.

We were surprised to learn that in the last month or so, the delegations from the Department's Secretary have changed, so that EPAC team Directors now have the delegation to impose all disciplinary action apart from dismissal and a direction to resign. This means that Team Directors now have the authority to demote and fine an employee.

We are of the view that granting of the delegation to demote to EPAC team Directors is a retrograde step, as the decision to demote is a career and life-defining decision that, in our view, should only be made at the highest level of EPAC. We make recommendation that this delegation should be withdrawn.

A major issue when the delegations were changed was ensuring consistency. We were told by EPAC that delegated decision makers and the EPAC Principal Legal Officer meet from time-to-time to discuss a range of issues impacting on disciplinary decision making, so as to achieve consistency. We have been informed that EPAC is currently working on creating a number of fact sheets relating to certain common forms of misconduct (e.g. conflicts of interest, academic fraud, secondary employment, breaches of professional boundaries). This work is very promising, but it is at an early stage. This work is to be encouraged.

Numerous submissions that we received referred to a lack of confidence in decision-making by EPAC because those decisions are made by a single person without the benefit of a panel of decision-makers or advisers. The view was also expressed that previous decisions made by the EPAC ED have been inconsistent. Some submitters expressed the view that decisions by EPAC have been unduly harsh in individual cases. Others suggested that decisions by EPAC were unduly lenient in leaving employees who have committed misconduct in schools.

We are of the view that these submissions highlight a lack of transparency and consistency in decision-making in EPAC and that the only way to gain confidence in the whole EPAC system of decision-making is to adopt a process in which major decisions involving the most serious disciplinary actions (dismissal, requirement to resign, and demotion) are made with the benefit of advice from a panel consisting of both senior EPAC staff and several senior independent outsiders from other parts of the Education Department.

We asked EPAC for its views about the implementation of a panel of people to assist the ED in her decision making for matters where dismissal, demotion or requirement to resign is being considered. EPAC says that the implementation of a Panel to advise EPAC decision makers about significant decisions is not without merit, but that if the panel is comprised of officers who have other roles or who are expected to read and absorb all the material, this is likely to be administratively cumbersome and may result in even further delays. EPAC has also raised the concern that if a panel makes a final decision and the PSOA subsequently appeals the Panel's decision to the IRC, it may be required for every member of the panel to give evidence in the appeal.

EPAC has acknowledged that there is benefit in having a database that could be used as a way of benchmarking outcomes. While each matter should be looked at on its merits, there is a need to ensure consistency across matters and a benchmarking database could assist in that regard. Any such database could split matters into different categories of conduct with the relevant outcome. A short summary of relevant mitigating or aggravating factors would be listed so as to explain the rationale for the imposition of certain outcomes. This would assist with consistency across the various delegated decision makers in different teams and assist the ED in maintaining consistency in major decision-making. We see great merit in the establishment, development and continual updating of such a database.

The Review was informed that EPAC staff had reported an increase in the number of matters where a decision has been made in EPAC to allow an employee to continue their employment in the Department, yet the OCG had barred that same person from working with children. This would suggest an inconsistent approach between EPAC and the OCG, and perhaps exemplifies an overly lenient approach to decision-making by EPAC. Like EPAC, the

guiding principle for decisions of the OCG is the protection of children. The paramount consideration under the *Teaching Service Act* and *Education (School Administrative and Support Staff) Act* is also the protection of children. This being the case, one would not expect to see one agency (EPAC) allowing a person to continue to work in an environment with children and the other agency (OCG) to bar that same person from doing so.

We are of the view that the two measures that we have recommended – a panel based decision making process and a database of previous decisions by EPAC and comparable decisions by other agencies and tribunals – would both go a long way to ensuring internal consistency within EPAC and also consistency between decisions made by EPAC and those made by OCG. See below for further analysis and recommendations.

Panel decisions in cases of less serious misconduct

Decisions in less serious cases of misconduct are made by EPAC team Directors. We understand that all decisions are made by a Director who is in a different team to the investigator who has prepared the Report. If a team Director has signed off on an investigation report recommending that misconduct has occurred, the file is always allocated to a different Director for decision-making. This is an exemplary practice. However, we are of the view that such decisions should, once again, be made in the context of a panel environment in order to ensure consistency and quality of decision-making (explained further below).

Inadequate and inconsistent drafting of allegations

We have been made aware of a number of EPAC matters in which the drafting of allegations was inadequate and failed to properly take into account the underlying evidence obtained during an investigation. Letters of allegation are required to be approved by EPAC team Directors. We have been informed that a few of the team Directors in EPAC do not read the underlying evidence to formulate and/or approve the allegations that are sent to PSOs. We have been made aware of several cases where the allegations that were approved by the relevant Director were later found to be inaccurate and had to be withdrawn. We understand that there have been no consequences for Directors who do not read the underlying evidence. If any difficulties ever arise, we have been informed that blame is placed squarely on the Investigator who did the initial drafting, rather than on the Director who approved the letter of allegations. A majority of team Directors do read the underlying evidence and their decisions and recommendations are therefore more comprehensive and soundly based.

We are of the view that when team Directors approve allegations and endorse investigation reports, they have an obligation to personally assess the underlying evidence, including interviews with and statements by witnesses. We are of the view that those few Directors who do not review and consider the underlying evidence are failing in their responsibilities. We do not think that this is a problem that derives from overly heavy caseloads.

EPAC Directors are at a very senior level in the Public Service, and as such they have an obligation to uphold the very highest levels of professionalism and dedication. There is no excuse for any of them failing to assess the underlying evidence when approving allegations of serious misconduct against teachers and other employees of the Department. This shortcoming should be urgently addressed by EPAC management.

We have also become aware that the way in which allegations of misconduct are drafted varies between teams. Some are drafted like criminal charges and others are drafted in a more narrative form. There are no guidelines or policies as to how to structure allegations. We are of the view that such variations in the drafting of allegations is undesirable and should be addressed by EPAC management.

Employees who are subject of both performance management and misconduct allegations

Since the Director of SECT position was created, where an employee is subject to both an improvement program and a misconduct investigation, there are now two separate decision makers. For example, a teacher may be subject to reportable conduct allegations relating to an assault, while also being subject to performance review of their classroom teaching practices. In these circumstances, the question that arises is should both matters be referred to the one decision maker for a more holistic approach and to ensure that the final decision is appropriate to the employee's total circumstances? We have been informed that at any given time, there are approximately 20 matters that involve both a performance investigation and a misconduct allegation.

EPAC says that an employee can be put on a staff improvement program while misconduct allegations are being investigated. It has been said that each is independent and will focus on different aspects of the employee's performance and conduct. EPAC officers work between the various teams to ensure that there is not an undesirable overlap of issues requiring the employee to respond to the same issues in the two different processes. EPAC officers and Directors arrange case conferences to clarify their respective roles and responsibilities in an attempt to prevent an adverse impact on the employee. There will often be interplay between issues, but the employee will not be asked to respond to a misconduct allegation during the performance process. Neither will the employee be asked about classroom teaching practices when responding to allegations of misconduct. Should one process be finalised or discontinued, the other will continue until concluded.

We do not perceive that there is any further action that needs to be taken in such matters.

Differences of opinion between investigators and EPAC team Directors

We refer to the chart earlier in this chapter of a typical EPAC investigation. We understand that there is presently a common practice that discourages any difference of opinion between the recommendation of an investigator and the recommendation endorsed by that investigator's team Director. We understand that the current practice is for Directors to talk

to the investigators and seek to reach agreement on the recommendations prior to the report going to the ED.

We think that this is undesirable. Directors should be encouraged to document their reasons for disagreeing with the recommendations of the investigator. Differences of opinion are to be encouraged where those opinions are genuinely held. The ED should be encouraging the team Directors to express their frank and fearless advice about investigations. The ED has denied such an approach, but we have been informed of it from other sources, so we must accept it as a fact.

Independence of the main decision-maker

In order to ensure independence, objectivity, transparency and fairness, it is important that those who are the final decision makers within EPAC have not had previous involvement in the investigation of the allegations. Any involvement in the investigation is likely to create a lack of objectivity on the part of the decision-maker.

EPAC has informed the Review that it has systems in place to ensure that the decision makers have not had previous involvement with the investigation of alleged misconduct. This is not the experience of former and current employees of EPAC who have reported that the ED is often involved in the oversight of investigations before a report is submitted to her for consideration. In our view this compromises the ED's independence and objectivity as a decision-maker.

The Review was told that the ED regularly requests updates and talks to investigators and stakeholders about individual matters prior to an investigator's report being submitted. We understand that the ED regularly expresses a view on matters well prior to her formal decision making. By the time she is required to make a disciplinary decision, she is often well acquainted with significant amounts of the evidence that has been gathered by the investigator. Whilst it is understandable that the ED would wish to keep track of the progress of investigations, we are of the view that there is an existing management structure consisting of EPAC team Directors and Principal Investigators for keeping track of the progress of investigations – without the involvement of the ED.

We do note, and accept as appropriate, that the ED may make certain enquiries when considering a disciplinary matter. These include:

- Requesting further investigation if additional issues are raised in a PSO's response to preliminary findings and proposed disciplinary action
- Making further enquiries of possible witnesses nominated by the PSO
- Consulting with a specialist e.g. disability specialists, IR, legal
- Seeking legal advice about the probity of evidence or other legal issues
- Clarifying the personal circumstances of the PSO. For example, if the PSO offers in mitigation that they have a health issue that has not previously been revealed, and

that may have impacted on their conduct, the ED may request further and better particulars, including any treatment being undertaken to address the issue.

If a matter has given rise to media interest, or if a school community is particularly outraged by the alleged conduct of an employee, or if there have been dysfunctional interactions between school staff members including the PSOA – then we believe that the ED may discuss the implications of certain possible outcomes with the respective regional ED or DEL to determine the feasibility of taking a certain course of action, including interim risk management steps.

Delivery of EPAC letters

EPAC often requests school executives to hand deliver letters in a private meeting. Letters which may cause stress to employees are not provided to employees on Fridays as they may not have access to personal support at the weekend.

As a result of consultation with the Teachers Federation, over the summer vacation EPAC does not send letters of notification or allegation or letters of final outcome to teaching service employees, unless the employee expressly agrees for EPAC to do so.

We agree with this approach.

Casual approval

The Review was informed that in some cases where there has been a finding of misconduct, the disciplinary action taken has been to remove the teacher from a permanent or temporary position but to allow the teacher to seek casual employment elsewhere. At times, this is accompanied by a requirement to obtain referee reports from two Principals. In some cases, there is no requirement for the teacher to work for any specific number of days as a casual employee before providing referee reports from Principals. In some cases, casual employees have only performed three days' work prior to obtaining a reference from a Principal and submitting it to the Department. The Review also understands that in some cases there has been a settlement reached with EPAC in the IRC for very short periods of casual work in such circumstances.

EPAC says that at times, following a disciplinary decision, employees are granted limited casual approval for a period of time, usually 12 months, with the proviso that they submit two reports from Principals at schools that they have worked in, to demonstrate that they have met the Australian Professional Standards for Teachers to a satisfactory standard. Failing to submit reports may lead in some circumstances to having their casual approval withdrawn.

Some employees will struggle to obtain reports from Principals because of an inability to secure casual work. Some Principals are reluctant to make appraisals based on only one day's casual work in their school. In some instances, EPAC will accept a "reference or report"

from a school in which the teacher has only had three to five consecutive days of casual work. These are assessed by EPAC Directors and a recommendation is then made to the Director of Recruitment and Employment in HR whether the employee can continue to work on a limited casual approval or an unlimited casual approval.

We are of the view that it is highly undesirable where disciplinary action has been taken as a result of sustained findings of misconduct against a permanent or a casual teacher for that teacher to be permitted to provide referee reports from Principals on the basis of only a few day's work. Whilst we understand that it may be difficult to some employees to obtain casual employment, this is a problem that the employee must find ways to overcome. We are of the view that EPAC should require at least the equivalent of a month's teaching within a period of a year prior to accepting a referee report from a Principal. The equivalent of a month's teaching does not need to be at the one school, however in the event of multiple schools there should be a referee report from each Principal. The value of a Principal's report after just a few days of teaching is so minimal as to be worthless.

Not to Be Employed (NTBE) list

The Review has been informed that in some cases in which employees have had findings of serious misconduct and have been placed on the NTBE list, the letter informing the employee of their placement on the NTBE list also contains advice that the employee may apply to be taken off the NTBE list. Sometimes this advice is stated without any time limit before the employee can apply to be reinstated. It has been suggested that this creates the false impression that within a short time the employee can seek reinstatement by applying to be taken off the NTBE list. This requires the HR section of the Department to manage unrealistic expectations in circumstances where there is no real prospects that the person will be taken off the NTBE list.

EPAC responded to this by saying that if an employee is permanently placed on the NTBE list because they have engaged in misconduct that precludes them returning to work in child related employment, such as proven sexual misconduct, they should not be advised that they have a right to appeal the decision. However, in other circumstances, for example where the employee has been placed on the NTBE list because of a mental or physical health issue, or a drug and alcohol problem, they are advised that they may seek a review of placement of their name on the NTBE list should their circumstances change or should they successfully address the issues for which they were placed on the list. The decision about whether or not they remain on the NTBE list is a matter for the Probity Unit of the Department, which then seeks information about the matter from EPAC.

We are of the view that there should be much more specificity provided to employees when they have been informed by letter that they have been placed on the NTBE list. Where they have been temporarily placed on the NTBE list pending an investigation, they should be informed of that. Where they have been permanently placed on the NTBE list for health, drug or alcohol issues, but there is a prospect of rehabilitation, they should be informed that they can apply to be removed from the list upon production of evidence that they have satisfactorily rehabilitated themselves from the previous condition. Where they have been

permanently placed on the NTBE list because of a finding of other misconduct, but it is considered that the conduct does not render them ineligible to apply at a future time, it should be stated in the letter that they can apply to be removed from the list after a stated number of years. Where it is considered that they ought never to be employed in the Department at any time in the future, it should be specified in the letter that they are not eligible to apply at any time.

Discontinued matters

We have been advised by EPAC that investigations are categorised in *Resolve* as “discontinued” for a number of reasons. They include: where there is insufficient evidence to put allegations to the PSOA; where there is only a general allegation and no supporting evidence that would permit EPAC to put an allegation; because there are extenuating circumstances, such as the death of the PSOA; where the PSOA is too unwell to participate in an investigation; where the PSOA has separated from the Department because of retirement or a medical condition and where there is no prospect of the employee working again. In these circumstances, EPAC usually consults with the NSWOO or, in the case of allegations of corruption, with the ICAC to advise that they are proposing to discontinue the investigation.

The Director of the team in which the case is being managed decides whether a matter may be discontinued. In some teams, we understand that the Director requires a written briefing to be completed which sets out the reasons why the matter is to be discontinued. In other teams, we understand that there is no such requirement.

We are of the view that the circumstances in which EPAC matters are “discontinued” are so varied that they should be recorded in different categories for different factual situations. These additional categories should be available on *Resolve*. Where allegations cannot be sustained because of an absence of evidence, there should be a finding of “no sufficient supporting evidence”. Where there are extenuating circumstances, such as death or ill-health, there should be a finding of “discontinued for extenuating circumstances”. Where the matter has been discontinued because of separation from the Department, there should be a finding of “separation from the Department”.

ANALYSIS AND RECOMMENDATIONS

The delay between notification to EPAC and letters of allegations to the PSOAs

Many individuals and stakeholder organisations have complained about the length of time PSOAs wait until they receive for the first time notice of the allegations against them. Although the time interval between receipt of allegations by EPAC and notification of specific allegations to the PSOA has been reduced over the last two years, the current average delay is still 6.5 months, which in our view is still too long. It is also our view that the initial letter of notification to the PSOA that an investigation has been commenced

should contain as much information as possible, in order to give the PSOA an opportunity to suggest to EPAC the names of witnesses they should interview and other avenues of enquiry.

When we suggested this to the ED of EPAC, she saw benefit in providing more detail to the PSOA in the initial notification letter, from the perspective of employee welfare and the quality of the investigation. In more simple allegations that involve only one specific incident or one kind of conduct, EPAC agrees that more specific detail could often be provided to the PSOA at the time of the notification letter. However, EPAC holds concerns that this may be difficult to provide in the more complicated matters that involve multiple allegations of misconduct, particularly where the allegation is of a number of different kinds of misconduct. In such cases, the amount of information that EPAC holds weeks after receipt of a complaint is often very limited. EPAC has stated that after further enquiries are made, some of the initial allegations may fall away and quite frequently additional allegations are identified. EPAC is concerned that if allegations were conveyed to the PSOA in a piecemeal fashion, this could negatively impact on the welfare of the PSOA.

EPAC acknowledges that in future matters, more specificity is required in all notification letters. There should also be a focus on ensuring that the letter of allegations is sent to the PSOA much closer to the date of receipt of the allegations. EPAC agrees that the reduction in time for providing the letter of allegations would go some way towards addressing the concerns raised by stakeholders.

We are of the view that there is a balance to be achieved between the legitimate rights of a PSOA to know the specific allegations made against them at the earliest opportunity, and the legitimate interests of EPAC to conduct investigations without improper interference by the PSOA with witnesses or the evidence. We are of the view that at the present time the balance has not been correctly positioned, and that specific allegations are not being communicated to the PSOA in a timely fashion. This is having a devastating psychological and sometimes financial effect on PSOAs and results in them being deprived of an opportunity to present evidence or names of witnesses at a time when memories are fresh and evidence is still available.

We suggest below in our recommendations how the balance should be realigned.

Towards a new definition of misconduct

For the reasons that we have stated above, we are of the view that the current definition of misconduct is inadequate and that there is merit in a more specific definition.

We suggest that the following would provide a clearer definition of misconduct:

Misconduct is conduct of a kind that a reasonable employee of good repute and competency would regard as inappropriate and/or unacceptable to a substantial degree and to an extent that could warrant disciplinary action in the form of

dismissal, direction to resign, demotion, fine, official reprimand or official caution.

Examples include (but are not restricted to) the following:

- a. All sexual offences under the Crimes Act NSW
- b. All criminal indictable offences punishable by imprisonment for more than two years
- c. Other criminal offences that involve allegations of violence, dishonesty, theft or fraud
- d. Conduct that may cause serious and imminent risk to the health or safety of a person in the workplace
- e. Serious physical violence committed against, with or in the presence of a child, or behaviour causing significant emotional or psychological harm to a child, or significant neglect of a child
- f. Inappropriate sexual relationship with a student
- g. Conduct that could be viewed as sexual grooming of a student
- h. Inappropriate sexualised conduct, behaviour, language or actions in the presence of a student
- i. Accessing child pornography at any time and at any place
- j. Serious crossing of a professional boundary
- k. Striking a student, another employee or a member of the public in the workplace without lawful excuse, or otherwise inflicting actual physical harm on, or endangering the life or safety of another person in the workplace without lawful excuse
- l. Failing to act in accordance with applicable child safety standards, such as a breach of a relevant code of conduct involving the safety of a student or failing to take reasonable steps to respond to and report suspected child abuse
- m. Wilfully damaging or destroying substantial items of property in the workplace
- n. Alcohol or drug misuse in the workplace or affecting the employee's performance of their duties
- o. Permitting or condoning alcohol or drug use by a student whilst under authority
- p. Serious discrimination or vilification on the basis of race, religion, disability, gender or sexual preference
- q. Serious and persistent sexual harassment
- r. Serious and improper use of school information or school or Departmental resources for private purposes or for personal gain
- s. Serious and/or multiple drink-driving offences
- t. Serious or gross negligence in the workplace creating a risk of serious physical harm to a staff member, student or visitor
- u. Serious inappropriate use of the internet or the Department's information technology resources
- v. Serious inappropriate use of the Department's email system, including, for example, sending an inappropriate, pornographic or abusive email
- w. Serious wilful or reckless dishonesty in the workplace
- x. Serious and persistent bullying in the workplace

- y. Serious failure to adhere to a Departmental requirement for financial transactions
- z. Serious failure to report a conflict of interest in the workplace
- aa. Serious and deliberate disclosure of confidential information
- bb. Serious and deliberate failure to adhere to the Department's code of conduct
- cc. Repeated or persistent incidents of non-serious misconduct
- dd. A serious breach of a Departmental direction, warning, caution, or reprimand
- ee. Failure in a Departmental conduct monitoring programme
- ff. Taking any detrimental action (within the meaning of the *Public Interest Disclosures Act 1994*) against a person that is substantially in reprisal for the person making a public interest disclosure within the meaning of that Act
- gg. Taking any action against a person that is substantially in reprisal for an internal disclosure made by that person.

A panel for assisting decision-making in serious allegations of misconduct

For the reasons that have been discussed earlier in this chapter, we are of the view that there is much to be gained by requiring all major decisions about misconduct involving the potential for the most serious disciplinary actions (dismissal, direction to resign and demotion) made by a single delegate, but with the benefit of a panel environment. This has been very successful in the Office of the Children's Guardian and the Police Force's Professional Standards Command. We are of the view that the system of a single decision-maker assisted by a panel of both internal and external advisors is likely to encourage greater confidence in EPAC decision-making in cases of alleged serious misconduct. We are of the view that the panel system is preferable to other systems that uses cumbersome external Tribunals for decision making. We include in our recommendations below details of such a panel.

An advisory panel only works well where the delegated decision-maker encourages rigorous discussion and argument among panel members about each case before making a decision. In this way, the delegate has the benefit of the collective wisdom of all panel members and derives the benefit of debate, discussion and dissension that occurs in a panel environment. In order for the panel system to work, the delegate must have the professional confidence to encourage rigorous debate, discussion and dissension. We are of the view that if EPAC decision making was based on a panel environment as suggested, it would go a long way towards garnering confidence in the whole EPAC Investigative system among PSOAs, school communities and the general public.

We are of the view that the decision to demote a professional employee in the Department is a career defining event that should only be made at the highest level of decision-making. We understand that several weeks ago, fresh delegations were given to EPAC team Directors giving them the power to demote and fine. We are of the view that the power to demote should not be devolved to EPAC Directors, but should remain with the ED of EPAC, assisted by a panel as suggested.

A panel for assisting decision-making in less serious allegations of misconduct

In less serious cases, where decisions are currently made by EPAC team Directors, and only disciplinary action of a minor kind may be taken (to issue a caution, reprimand or fine), we are of the view that once again the decision-maker should make a decision in the context of an advisory panel. EPAC Directors should make decisions about disciplinary action of a minor kind only after rigorous discussion, debate and consultation with a panel, details of which are detailed below in our recommendations.

We are of the view that the investigator who has prepared the investigation report should present the matter to the panel. This will be excellent training for investigators. Once again, we are of the view that an EPAC Legal Officer attending the panel meeting should present similar, comparable cases from the past to assist the decision-maker.

A Database of previous cases and comparable decisions in other agencies and Tribunals

A variety of submitters, including former and present employees of EPAC, have reported that EPAC decisions are made on an ad-hoc basis without regard to any previous decisions in similar cases. In their experience, there are huge variations in recommendations and decision-making between different investigators, team Directors, and EPAC teams in terms of: initiation of investigations; findings of misconduct; disciplinary action in response to findings of misconduct; placing of casual employees onto the Not to Be Employed (NTBE) list; placing permanent employees into alternative duties; and suspending employees with or without pay. It has also been reported to us that there is little to no reference to decisions in other jurisdictions, domestic tribunals or other government agencies, including the New South Wales Civil and Administrative Tribunal (NCAT) and decisions by the Office of the Children's Guardian (OCG) regarding Working with Children Check bars.

We understand that there have been no formal steps taken to align EPAC decisions with decisions made by NCAT in working with children cases. The legislation governing both EPAC and NCAT decisions in OCG cases requires that the both be protective and not punitive in nature. EPAC submitted that they are aware of NCAT decisions and that the Principal Legal Officer routinely reviews the NCAT decisions in respect of working with children check clearances. However, we have been informed by former and present employees of EPAC that in practice very little regard is paid to relevant decisions by NCAT or the Industrial Relations Commission (IRC) in other disciplinary proceedings. We are of the view that this demonstrates a reluctance to align EPAC decisions with those of other agencies and Tribunals.

There is absolutely no reason why a more precise definition of misconduct and a database of previous cases could not easily be created by EPAC. These measures would go a long way to demonstrating that EPAC's decisions are both consistent and based upon established and clearly enunciated policies and procedures. We are of the view that the two measures that

we have recommended – a panel based decision making process and a database of previous decisions by EPAC and comparable decisions by other agencies and tribunals – will go a long way to ensuring internal consistency of decision making within EPAC and also consistency between EPAC and those other domestic tribunals and agencies.

RECOMMENDATIONS:

1. The most common complaint against EPAC concerns the lack of timeliness of investigations and decision-making. There still exist unacceptable delays in EPAC's consideration of complaints of misconduct. Delay results in serious trauma to Persons the Subject of Allegations (PSOAs) and causes financial loss to the Department and disruption to schools. Our previous recommendations for additional resourcing of EPAC should result in the lowering of caseloads of investigators and more timely investigations and decision-making. However, there are many additional steps that can be taken to streamline investigations and decision-making in EPAC.
2. A letter of notification of an investigation should be sent to the PSOA at the earliest possible opportunity after allegations have been received by EPAC. Every attempt should be made by EPAC to provide as much specificity as possible in letters of notification to PSOAs about the nature of allegations that have been made. Where there is sufficient specificity of allegations in a letter of notification, the PSOA should be invited to nominate any witnesses that EPAC should interview or to provide any documentation or other information relevant to the investigation. In all but the most complex cases, letters of notification should be sent to the PSOA within one month of allegations being received by EPAC.
3. We recommend that, as a matter of procedural fairness, witnesses nominated by the PSOA should generally be interviewed, and that a decision not to interview them should only be made where there are compelling reasons. We are of the view that those compelling reasons should always be stated in the investigator's report, so that in the event of a finding of misconduct, this report is provided to the PSOA, who then has an opportunity to see the reasons why those witnesses have not been interviewed.
4. We recommend that urgent action be taken to ensure that all EPAC team Directors are required to read the underlying evidence prior to the formulation of letters of allegation sent to PSOAs and prior to the endorsement of investigation reports. In this way, all EPAC Directors will be required to take responsibility for the proper formulation of allegations and recommendations as to findings. In this way it will be less likely that allegations will be made that are not supported by the evidence.
5. EPAC team Directors should be encouraged to express their frank and fearless advice about recommendations that have been made by investigators in cases of alleged misconduct. Differing views should not be discouraged, as they provide additional assistance to the decision-maker.
6. The Executive Director (ED) of EPAC should be discouraged from involvement in or oversight of the investigation process, so as to remain impartial and objective for the purpose of decision-making in cases of serious misconduct. Oversight of investigators can properly and efficiently be carried out by EPAC team Directors and Principal Investigators. There are certain circumstances (discussed in this Chapter) in

which it would be appropriate for the ED to request further investigations or to become involved in interim risk management activities.

7. All delegated decisions by EPAC regarding serious misconduct where disciplinary action may be taken to dismiss an employee, or to direct an employee to resign, or to demote an employee should be made by the delegate only after extensive consultation with a panel consisting of:
 - i. The Executive Director (ED) of EPAC
 - ii. Two of the six Directors in EPAC
 - iii. The Principal Legal Officer of EPAC
 - iv. A Senior Executive from the Human Resources Division of the Department
 - v. A serving or former Executive Director School Performance or DEL who has had recent experience in the school system.

The panel should meet at regular intervals. All members of the panel should be provided in advance with all the papers relevant to each case to be referred to the panel. The convener of the panel should be the ED of EPAC. Each case for decision should be presented to the panel by the Director in whose team the investigation has taken place. The Principal Legal Officer of EPAC should provide to the panel details of similar previous cases and their outcomes. The ED should encourage rigorous consultation, discussion and debate about each case prior to a final decision being made by the ED at panel meetings. After each meeting, the Principal Legal Officer of EPAC should prepare a brief summary of each matter and the final decision, in order to provide it to all EPAC professional staff as an educational tool. The Principal Legal Officer of EPAC should also prepare a brief, anonymised summary of the case, including the decision and the disciplinary action taken, for dissemination to all employees in the Department. This will provide a valuable educational tool for all employees. These procedures for major decision-making should be made known throughout the Department and to all relevant stakeholders.

8. We recommend the revocation of delegations to EPAC team Directors giving them the power to demote employees of the Department who have been found to have engaged in misconduct. We are of the view that this career-defining disciplinary action should be reserved to the Executive Director of EPAC, assisted by a panel as suggested above. We do not recommend the revocation of the delegation for EPAC Directors to fine.
9. All delegated decisions by EPAC team Directors regarding less-serious misconduct where disciplinary action of a minor kind may be taken (to issue a caution, reprimand, warning or fine) should be made by the delegate only after extensive consultation with a panel consisting of:
 - i. The delegated team Director (who is not the Director of the team that has investigated the matter)
 - ii. One other EPAC team Director (again not from the team that has investigated the matter)
 - iii. A Legal Officer of EPAC
 - iv. The investigator who has prepared the investigation report.

The panel should meet at regular intervals. All members of the panel should be provided in advance with all the papers relevant to each case to be referred to the panel. The convener of the panel should be the delegated team Director. Each case for decision should be presented to the panel by the investigator who has prepared

the investigation report. The Legal Officer of EPAC should provide to the panel details of similar previous cases and their outcomes. The convener should encourage rigorous consultation, discussion and debate about each case prior to a final decision being made by the delegate at the panel meetings. After each meeting, the Legal Officer of EPAC should prepare a brief summary of each matter and the final decision, in order to provide it to all EPAC professional staff as an educational tool. The Legal Officer of EPAC should also prepare a brief, anonymised summary of the case, including the decision and the disciplinary action taken, for dissemination to all employees in the Department. This will provide a valuable educational tool for all employees. These procedures for major decision-making in less serious cases of alleged misconduct should be made known throughout the Department and to all relevant stakeholders.

10. There is a lack of guidance and established policies and procedures to assist EPAC intake offices, investigators and decision-makers to know what constitutes “misconduct”. We are of the view that the absence of guidelines, policies & procedures and a database of previous cases affects not only the PIT, but indeed all investigators, managers and decision-makers in EPAC. In our view, this is why there have been many submissions made to the Review that the decisions of EPAC at every level are arbitrary and inconsistent. We recommend that there be a new, more specific definition of “misconduct” which, in our view, will provide considerable assistance to investigators and decision-makers at every level of EPAC. We have included in our analysis above a suggested new definition.
11. We are of the view that there is an urgent need for a database of EPAC decisions in previous cases, so that investigators can compare them to cases at hand. The Principal Legal Officer of EPAC and their legal staff should work towards producing a database of previous EPAC decisions and also the decisions of other agencies and Tribunals in relevant cases, including the NCAT and the Office of the Children’s Guardian. The database should include a brief account of the alleged facts, findings and disciplinary outcomes. This database should be made available to all EPAC professional staff to assist in making recommendations and decisions at every level.
12. Where final disciplinary action has been taken against a permanent or casual teacher, and that action has been to grant a limited right to do casual teaching for a period of up to one year, that teacher should be required to provide to the Department referee reports from at least two of those Principals for whom they have done casual work for at least the equivalent of a month’s work at each school. It should no longer be permissible for a teacher to provide a referee report from a Principal after working for only a few days. It should not be an excuse that the teacher has not been able to obtain sufficient casual work.
13. There should be much more specificity in letters addressed to employees advising them that they have been placed on the Not to Be Employed (NTBE) list. In particular, it should be specified whether, and under what circumstances or after what length of time, they will be eligible to apply to be removed from the NTBE list. Where employees are placed on the list temporarily pending an investigation, they should be advised of this. Where employees have been placed on the list because of mental health, drug, alcohol or other similar issues, they should be advised specifically what kind of documentation they will need to provide to the Department if they wish at some stage to be removed from the list. If there is a condition that

they will be eligible to apply to be taken off the list after a specified length of time, that time should be stated and any other conditions should also be stated.

14. We are of the view that the circumstances in which EPAC matters are listed in *Resolve* as “discontinued” are so varied that they should be recorded in different categories for different outcomes. These additional categories should be available on *Resolve*. Where allegations cannot be sustained because of an absence of evidence, there should be a finding of “No sufficient supporting evidence”. Where there are extenuating circumstances, such as death or ill-health, there should be a finding of “Discontinued for extenuating circumstances”. Where the matter has been discontinued because of separation from the Department, there should be a finding of “Separation from the Department”. Cases in which the alleged victim has refused to cooperate with an enquiry should be categorized as “Alleged victim uncooperative”.

CHAPTER 8

LOCAL MANAGEMENT OF LOW-LEVEL MISBEHAVIOUR ALLEGATIONS

We have stated in chapter 6 our view that matters referred to EPAC should be divided into two categories instead of the current three, and that the category of low-level matters that are currently dealt with by EPAC as “Local Management” (LM) matters, by remitting them to local school managers for investigation, should be abolished. We now provide further discussion and analysis of the issue of LM matters.

It will be recalled that LM is directed by EPAC where an allegation is allocated for investigation by a local Principal or DEL, but the final decision is made by EPAC. This option for speedy, local management is made when the allegation is potentially low-level misbehaviour that warrants oversight by EPAC, but not a full investigation. LM is currently undertaken when the alleged conduct is:

- Child protection but does not reach the threshold for reportable conduct (as per Part 3A *Ombudsman Act 1974*); or
- Is not reportable conduct pursuant to the ‘class or kind determination’ (see Chapter 6).

Most of these LM matters are low-level, child protection complaints that do not amount to reportable conduct. Examples include: a teacher pushing, shoving, pulling, grabbing or forcefully tapping/hitting students (where there is no injury); belittling or offensive comments to a student; purposely blocking a doorway to prevent a student leaving a room.

The Executive Director (ED) of EPAC has informed us that the matters that are allocated for LM are those that do not come within the Ombudsman’s reportable conduct scheme, but rather fall within the “class or kind agreement” with the Ombudsman. These matters are oversights by EPAC because the Department is required to demonstrate to the Ombudsman that it has taken appropriate action.

EPAC has informed the Review that over the last 12 months EPAC investigators monitored 218 Local Management (LM) matters. While not as onerous as full investigations, LMs do require some administrative action by officers.

As part of the intake process in the PIT, EPAC intake officers seek to identify whether an allegation is suitable for LM handling. The aim is to facilitate the timely resolution of less serious misbehavior by avoiding a full EPAC investigation. One of the six EPAC team Directors makes the decision as to whether a matter will be allocated for LM. When assessing whether a matter is suitable for LM, EPAC discusses the matter with the relevant workplace manager. Matters will only be handled locally where the workplace manager agrees to this. In some circumstances, an alternative local manager may be sourced to undertake the investigation.

EPAC has developed procedures for local managers to investigate less serious child protection allegations (see *Procedures for the local management of less serious allegations in the area of child protection against DET employees*). They include:

- A checklist of required action
- Forms to document the outcomes of the process.

EPAC investigators provide direct support to local managers who are investigating LM cases. An EPAC investigator is allocated to guide and support the Principal or other local manager through the process. This can include advice about relevant witnesses to be interviewed and other avenues of inquiry.

At the completion of the process, all relevant documentation is provided to EPAC to allow it to make a final determination on the matter, at which time the outcome will be conveyed to the PSOA, the alleged victim and the local manager. If the conduct that has been the subject of LM is sustained, the only action that can be taken is remedial action, usually in the form of a written direction or warning, which is usually given by the Principal on school letterhead. A copy of the letter is placed on *Resolve*. A caution or reprimand cannot be given because they are disciplinary actions that can only flow from a finding of misconduct.

Because there is no misconduct finding from an LM investigation, there will be no record of the finding on the PSOA's personnel file. The only record is on EPAC's *Resolve* database. Only findings of misconduct go on a personnel file. This means that an officer can have a number of LM findings, but unless they amount to misconduct the officer can move schools and the new Principal will not have knowledge of the LM investigations. Multiple LM findings may alert EPAC to an emerging pattern of conduct that might requires further action.

Submissions received about LM

The Review has received submissions that school Principals should not have to participate in any (low level) misconduct investigations, because it takes them away from their core function of educational leadership and requires them to deal with current staff. It has been submitted that low level misconduct should be investigated only by DELs. For example, the New South Wales Primary Principals' Association (NSWPPA) has submitted that:

“School leaders are not trained nor request to be skilled in investigation techniques, they are leaders of teaching and learning. School leaders are expected by EPAC to locally manage investigations without the capacity for effective implementation. We recommend that EPAC or DELs investigate misconduct issues, rather than at a local level of school staff, to avoid potential conflicts of interest and mishandling due to lack of expertise.”

DELs and Principals who have been required to deal with LM complaints feel inadequate to properly manage them and assert that in their opinion they should have been dealt with by

EPAC. For example, the Mooney-Mooney Principals' Network has submitted that:

“The current workload issues with EPAC being transferred to directors is seriously impacting on Directors, Educational Leadership capacity to do their core business.... Currently Directors deal with most escalations, and this is not their primary role which raises workload issues and stress in meeting current policy deadlines. Directors, Educational Leadership's core responsibility is to support school leaders and ensure school educational outcomes are achieved. To do this work they are required to be in schools most of their working week. It is not possible to carry the administrative load of complaints management effectively in between school visits. And more importantly it puts Directors, Educational Leadership in a compromising position to now determine a matter that they have coached the principal through trying to resolve at the front line.... Why do we have Directors managing complaints that could be more effectively and efficiently be handed by specialist administration officer assigned to education offices?”

It has also been submitted that DELs do not get adequate assistance from EPAC to investigate misconduct allegations. The Mooney-Mooney Principals' Network submitted that:

“EPAC has insufficient resources to adequately deal with the volume of misconduct matters and complexity of issues raised when directors are trying to deal with these around their core educational workload. This results in unacceptable delays and is unfair to all. EPAC's response appears to delegate more and more matters, which is not only inappropriate in many situations - it is disrespectful to other officers' core business. Misconduct should be independently dealt with by EPAC! It would be much easier to have coherent and consistency across our system in the way we manage misconduct if EPAC oversaw this and took this full responsibility for this area”.

At the other end of the spectrum, New Law Pty Ltd has submitted that:

“Far too many matters have been referred to EPAC when they could (and should) have been dealt with at a local level by senior management in the school or district. This is simply not appropriate and has overburdened EPAC with work that it not need do”.

The Teacher's Federation has similarly submitted that:

“Failure to provide appropriate support to complaint managers results in unnecessary referral of matters to EPAC which should be managed locally and contributes to workload issues and extended timeframes. There needs to be responsibility taken by the Department to provide professional learning opportunities for school leaders and DEL to better understand and manage employee performance and conduct processes.”

EPAC's response

In response, EPAC has said that any school manager is expected to address low-level, poor conduct by their staff in a timely manner. This is not an EPAC resourcing issue, but about day-to-day management responsibilities of school managers. DELs have role descriptions that clearly include a requirement to manage staff and to provide Principals with support and advice in such conduct matters. Principals have school management and leadership responsibilities that are not just about education and curriculum but include staff and student discipline. EPAC has submitted that their statistics indicate that more minor matters continue to be reported to EPAC in the hope that Principals or DELs won't have to take action. EPAC considers that there has always been a requirement that, as managers, Principals and DELs manage such complaints. In the past two years, the number of DELs has increased from 78 to 110, so they each have fewer schools and are therefore better positioned to assist Principals to manage school-based complaints.

EPAC assists principals and DELs to deal with some lower level matters where the conduct does not require investigation but rather the issuing of a letter advising the employee of the inappropriateness of the conduct; advising them it may amount to misconduct; and warning them not to engage in similar conduct in the future. This is very similar to a letter of direction. There is no reason why DELs could not issue these letters, as long as they have made sure that the facts are verifiable. The benefit of this approach to less serious matters is that the matter can be dealt with in a timely and appropriate manner.

EPAC points out that DELs have a better understanding of the context of their schools and school communities than EPAC officers in a centralised office. DELs have been given access to a complaints management database, so they can track the progress of LM complaints and cross-check to see if the same officers have been dealt with previously. EPAC has ensured that DELs and their administrative staff have received training in using the database. During 2018 training was given to all Executive Directors and their DELs in the management of complaints across the State. This training was well received and has now been converted into a series of on-line training modules that DELs can provide to their Principals and Principals can use with their staff.

EPAC argues that the records indicate that DELs have the capacity to do this work. Data from the Feedback and Complaints System, which DELs use to record complaints they manage under the School Community and Consumer Complaint procedure, indicates that DELs manage on average less than 10 consumer complaints each per year.

Operational Directorate	Complaints managed by School Operations		
	2018	2019 (5 mths to 29/5/19)	Projected total 2019
Metro South	138	83	199
Metro North	194	137	329
Regional South	148	58	139
Regional North	243	95	228
Rural South & West	124	52	125
Rural North	180	87	209
Not specified	15	16	38
Total	1042	528	1267

ANALYSIS AND RECOMMENDATIONS

In our view, EPAC should focus its resources on the investigation of serious misconduct. It is inefficient and unproductive for a centralised investigation unit like EPAC to be addressing minor misbehaviour in schools that is really an integral part of school management. We are of the view that such minor misbehaviour in schools should be investigated and subject to remedial action by local school managers. In particular, the DELs are eminently qualified to assist Principals in this regard. This will result in the speedy and efficient disposal of such matters by the persons who have the best local knowledge. EPAC, of course, can continue to provide educational services for local school managers.

In our view, if these low-level misbehaviour complaints are remitted to EPAC, they should either be categorised as “Enquiries” and remitted back to the school environment, or, if they are serious enough because there is potential misconduct, they should be investigated in the usual way by EPAC. This is why we have recommended in chapter 6 that the categories of matters considered by EPAC at the intake phase be reduced from three to two.

This will require EPAC to negotiate with the Office of the Children’s Guardian when that Office takes over the reportable conduct scheme from the Ombudsman’s Office on 1 July 2019.

RECOMMENDATIONS:

1. That the current category of “Local Management (LM) complaints” received by EPAC at the intake stage should be abolished. In lieu of this category, those matters previously categorised as LM matters should be assessed by the intake process identified in chapter 6 and categorised either as “Enquiries” or as matters suitable for investigation by EPAC because there has potentially been misconduct. Those matters categorised as Enquiries should be remitted back to school managers for resolution at the local level.
2. EPAC should continue to provide website and training support for local school managers in the investigation and resolution of low-level misconduct in schools.
3. EPAC should negotiate with the Office of the Children’s Guardian about these

changes when that Office takes over the reportable conduct scheme.

CHAPTER 9

INTERIM RISK MANAGEMENT MEASURES

Interim protection measures

In any system of managing misconduct, it is essential that there be the power to impose interim risk management measures. In the case of EPAC, the overriding consideration is the protection of children and young persons. On the other hand, the imposition of interim risk management measures has potentially devastating effects on the person subject of allegations (PSOA). A direction to perform alternative duties in another location removes the employee from their workplace, from their support networks and from their normal work activities, placing them in a location where there are likely to be few opportunities for meaningful work and only remote, impersonal support services. We have received many submissions from former and present PSOAs highlighting the devastating effect that such a measure has had on them. In most cases, either no explanation or no meaningful explanation has been provided to the PSOA as to why they were removed from their usual place of work, other than a reference to managing risk to students.

The options available

Where the allegations indicate that an employee may pose an unacceptable risk to a student or students, the Executive Director (ED) of EPAC and the EPAC Director Staff Efficiency and Conduct (in performance matters) have the delegations to:

- Place an employee on alternative duties, or
- Terminate a temporary contract and place the name of the person on the NTBE list while the investigation is completed and a decision is made as to what action, if any, will take place.

The ED and Director Staff Efficiency and Conduct also have the power to issue directions and/or to request Principals to monitor an employee's conduct pending the outcome of an investigation.

The options for interim risk management measures for permanent employees are:

- suspension (with or without pay);
- a direction to perform alternative duties at another location;
- directions to the employee not to engage in conduct;
- monitoring of conduct.

The only interim risk management measure used by EPAC for temporary or casual employees is to terminate their employment and to place them temporarily on the NTBE list.

The decisions to remove a Principal or teacher from a school, even on an interim basis, has enormous potential to destroy reputations and careers and causes enormous trauma and heartache. It should only be used when necessary for the protection of children and young persons.

EPAC says that decisions about suspension, placement of employees on alternative duties or on the NTBE list are made by the ED following a risk assessment and pending the outcome of an investigation. These options are only used if the nature of the allegations or the nature of the employee's conduct is such that risk cannot be effectively managed in the workplace. If risk cannot be managed in the workplace, the usual option for permanent employees is that they are placed on alternative duties at another site with their standard pay, terms and conditions. We understand that temporary or casual employees are generally provided with payment of four weeks salary in lieu of notice and their names are temporarily placed on the NTBE list to ensure that they do not move on to another school pending the outcome of the investigation.

Set out below is a table which shows the incidence of interim risk management measures for teachers as at 13 May 2019:

Active matters involving teachers as at 13 May 2019			
	All teachers	Permanent	Casual
Central	6	6	0
Non-school based	4	4	0
Primary school	112	90	22
School Counsellor	5	5	0
Secondary	196	146	50
School for Specific Purposes	10	9	1
TOTAL	333	260	73
NTBE	28	5	23
Alternative duties	34	34	N/A
Suspended without pay	9	9	N/A
Suspended with pay	1	1	N/A
On leave	12	12	N/A
TOTAL	56	56	N/A

Of 333 active investigations involving permanent and casual teachers as at that date, 72 (22%) have been subject to interim risk management measures of some kind. 32% of casual teachers had been placed on the NTBE list. Of those suspended, nine times more were suspended without pay than with pay.

Suspension with and without pay

Suspension, with or without pay, should only be done in “exceptional circumstances” in accordance with a Premier’s Memorandum (M1994-35 *Suspension of Public Employees from Duty*) that has not been updated for many years. The Premier’s Memorandum states that in exceptional circumstances the Chief Executive or delegate may suspend the employee without pay. Such circumstances would include: where an employee has been remanded in custody, or has admitted to misconduct that renders the employee unfit to continue in paid employment with the Department. A small number of employees have been suspended without pay when they have been placed in custody following criminal charges, have made admissions to serious criminal offences, have been barred from working in child related employment by the OCG following a Schedule 2 criminal charge, or have seriously breached lawful directions when subject to investigation for serious allegations e.g. making contact with the child victim when directed not to do so.

Suspension with pay may be used for a permanent employee for a variety of reasons:

- The employee would otherwise be placed on alternative duties at another location, but because of remoteness or travel restrictions, it is impractical
- The health of the PSOA precludes alternative work
- It is unsafe for other employees to have the employee attend alternative duties
- The period is so short it is impractical to make alternative duty arrangements

Suspension without pay is a very serious step, as it may cause enormous financial hardship. The Premier’s memorandum has the effect that suspension without pay will occur where:

- An employee has repeatedly failed to follow directions while on alternative duties and poses a risk to children or other employees
- The person has a WWCC bar and/or does not hold the required credentials to teach
- Bail conditions preclude attendance at a school or workplace including conditions not to use a computer
- A person is in custody.

We were informed that as at 1 May 2019, there were 10 permanent employees suspended without pay. Six were OCG disqualified, one had an expired WWCC clearance, one has been convicted of substantial and repeated thefts from the school, and two teachers who were being investigated for sexual misconduct had continued to make contact with the student victims despite being directed not to do so.

We have reviewed several files where teachers have been suspended, including one who was suspended without pay because of a criminal charge of a sexual nature. There was no attempt made by EPAC to examine the strength of the case against this employee prior to the decision to suspend without pay. The suspension caused severe financial hardship to the employee. The employee was subsequently acquitted of the criminal charge and all

allegations of misconduct were dismissed by EPAC. However, because the employee had been charged with a sexual offence, his WWCC clearance had been revoked by the OCG. Apparently, there is a policy that when a person is charged with a Schedule 2 criminal offence and have a WWCC bar imposed by the OCG, that bar is not an interim bar, and if that person is acquitted of all charges, he or she must apply to NCAT to have the bar lifted. This application to have the bar lifted can take an inordinately long time to be resolved. In the meantime, the employee remains unemployable in any school or other environment where there is contact with children. In a discretionary decision, when the misconduct allegations were dismissed against this employee, the ED of EPAC reinstated this employee's pay, even though he was then unemployable in schools.

We are of the view that this is an anomaly in the scheme of suspensions, and it creates the potential for unfairness and great financial hardship. This is discussed below under "Analysis and recommendations".

A direction to perform alternative duties

Whilst a direction to perform alternative duties is preferable to suspension, it is still a most serious step, even on an interim basis. Almost inevitably it causes harm to the reputation of the employee as there will almost always be rumours flying around a school as to why the employee has been removed. The employee is removed from all of their support networks in their former place of employment. Generally, the alternative duties are of a singularly dull and boring nature. We have been informed by many PSOAs that they spent most of the time on alternative duties sitting at a desk reading books or surfing the Internet. Several of them did online courses.

The Review received submissions that when an employee is removed from a school during an investigation, the employee should be provided with more information about the reasons behind the removal. For example, the NSWPPA submitted that "When placed on alternative duties, reasons should be discussed and explained by EPAC, even if it is a general explanation."

EPAC submitted that the employee is provided in writing with very general information about the nature of the conduct when directed out of a school or workplace (e.g. *allegations that you may have engaged in conduct that would amount to sexual misconduct towards a student*). As an employee's removal from school is a risk management action, and is based on the nature of the allegations, EPAC may have limited information at that early stage, particularly if there is a police investigation or criminal charges pending. Police are often keen for the Department to remove an employee from school, but do not want any information given to the employee. The investigator or their EPAC team Director generally point out to the police that an employee has a right to have some understanding of the reason for their removal. Generally, what happens is that a form of words is negotiated with the police. EPAC submitted that removal from school only occurs where the allegations are serious, and in most circumstances they believe that the employee does have some knowledge about why they are being removed. The PSOA is also able to speak to the EPAC

investigator or the team Director and are provided with information about support services available.

We have received a submission from SO&P that:

“A negative consequence of [the placement of PSOs in alternate duties] that needs to be addressed is that these staff members are placed in department offices, under the supervision of a DEL. Also based in these offices are a range of staff who sometimes find the presence of staff subject to serious child protection allegations intimidating and of general concern to their wellbeing. A better and safer process for these teachers on alternative duties is needed to protect our staff.” They have suggested that “In these cases, it would be more appropriate for the staff member to remain at home, rather than be placed in a department office.”

In response EPAC has said the issue of the placement of employees on alternative duties is not an EPAC staffing issue. Each alternative duties placement is case managed by the EPAC investigator. DELs are contacted directly and asked to find a suitable location for alternative duties and discussions are held about the location and size of the proposed site as to whether there are appropriate supervisory arrangements in place and whether there is any meaningful work for the employee to do. EPAC states that it does not place PSOs in sites if there are concerns expressed about the suitability of the location (e.g. close proximity to a school, small size, limited supervision). They rely on the local knowledge of the DEL, combined with information held by EPAC. If a site is considered to be no longer appropriate, the DEL will contact the EPAC investigator and negotiate a change of site.

The Department’s general practice has been to avoid placing employees at home. Placement away from the workplace makes it difficult to monitor the PSOs wellbeing and to monitor their conduct. For example, a teacher who has formed an inappropriate sexual relationship with a student will have far more opportunity to continue that relationship or have further contact with the student if they are unsupervised at home. Further, a small number of employees have committed suicide when not effectively monitored and supported.

Other directions to PSOs

The Department’s SO&P Division made a submission about the practice of EPAC in issuing directions to PSOs at the commencement of an investigation. In those directions, EPAC instructs PSOs that: they should not engage in the kind of conduct that has been alleged (e.g. breaching professional boundaries, bullying, being inappropriately alone with a student, communicating with the student on social media, et cetera). Other directions issued by EPAC direct the PSO that: they should not disclose to anyone else the existence or nature of the alleged conduct; that they should not communicate with the alleged victim or any person who may have made the allegation; that they should not communicate with any potential witnesses concerning the report of alleged misconduct; and various other directions of a similar kind.

SO&P submitted that PSOAs sometimes disregard such directions and engage in conduct in direct disobedience of the direction with impunity. SO&P complained that EPAC will often ignore such breaches of directions. They submitted that EPAC should impose consequences if the PSOA deliberately disregards a direction. They submitted that on many occasions EPAC has been informed that an employee has continued to act inappropriately and that EPAC treated such breaches as new or first events, rather than as a continuation of prior behaviour.

In order to ensure the integrity of EPAC investigations, it is essential that EPAC issue directions to PSOAs and that they are complied with. It is necessary for there to be consequences if PSOAs breach those directions.

Decision-making in interim risk management strategies

A decision to suspend a teacher or Principal or to direct alternative duties has a major impact on the PSOA, as discussed. Moreover, it should be also acknowledged that these serious risk management measures also have a major impact on school programs, student learning, and on the workload of other school staff. The uncertainty of how long the staff member will be out of the school prior to a decision being made creates enormous planning issues for school managers.

We are of the view that these major interim decisions should create a right to be heard on the part of the PSOA. We understand that sometimes these decisions need to be made urgently, however we are of the view that even in such situations the PSOA should have a right to be heard within days of an urgent decision being made.

As was discussed in Chapter 7, decisions about interim risk management measures lack consistency, predominantly due to a dearth of guidance and precedent. We recommend that the most serious interim risk management decisions (suspension, with or without pay, and directions to perform alternative duties) should be made in a similar way to final decisions on serious misconduct. The decision to suspend or a direction to perform alternative duties are potentially very destructive of careers and reputations. Such decisions invariably cause an enormous amount of distress to employees. Where such interim measures are not urgent, we are of the view that they should be made by the ED of EPAC in the same panel environment that has been described in Chapter 7. We acknowledge that in some circumstances the ED of EPAC will need to make these risk management decisions urgently. In such circumstances, we can see no reason why such decisions should not be retrospectively confirmed by the ED after rigorous debate, discussion, and even dissension in a panel environment.

ANALYSIS AND RECOMMENDATIONS

Interim risk management measures are only taken where it is necessary for the proper and appropriate management of risk to students and staff. The decision to suspend an employee or a direction to perform alternative duties in another workplace have serious psychological effects on PSOAs and are potentially destructive of careers and reputations. Although there are a very few cases of suspension of employees by EPAC without pay, we are of the view that it should only be used in cases where there is overwhelming evidence of serious misconduct which would inevitably result in the dismissal of a permanent employee. Examples include serious sexual misconduct where the employee has admitted to such conduct. We are of the view that suspension without pay should not occur as a matter of course when an employee is charged with criminal conduct, even of a sexual nature. There should always be an analysis of the strength of the case against the employee prior to a decision to suspend without pay.

We agree that the decision to direct an employee to perform alternative duties should only be given in cases where risk cannot be managed by the employee remaining in the school environment. In some cases, risk can be managed by transferring the employee to another school. This is obviously preferable to alternative duties in a regional office. We cannot see any viable option to alternative duties in those cases where risk cannot be adequately managed within the school environment. We wish to reinforce the idea that such a direction should only be given where absolutely necessary.

We are of the view that the decision to suspend or to direct an employee to perform alternative duties is such an important decision and has such potentially severe repercussions for the employee that it should be dealt with in a similar way to final decisions about misconduct. We acknowledge that the ED of EPAC must be in a position to make urgent decisions to suspend or direct employees to other duties in order to manage risk to students and other staff. However, we are of the view that in some cases this decision is not an urgent one. We are of the view that:

- If a decision is made to impose the most serious interim risk management measures (suspension, direction to perform alternative duties or placement on the NTBE list), in most cases sufficient information should be provided to the PSOA to explain the reason why the decision has been made to remove the employee from their normal workplace or to deny them access to casual work. In some cases (e.g.: a police investigation is yet to take place) this may not be possible.
- Where possible, the PSOA should have a right to be heard prior to the decision being made to impose such risk management measures, and, in the event of an urgent decision to remove an employee, there should be a right to be heard within seven days of the decision being made.
- The decision to impose such risk management measures should be made by the ED of EPAC in the same panel environment that has been suggested in the previous chapter for final decisions on disciplinary action. Where the

decision has had to be made urgently, we are of the view that it should be retrospectively confirmed by the ED of EPAC in the same panel environment.

RECOMMENDATIONS:

1. We are of the view that the most serious interim risk management measures (suspension with or without pay, direction to perform alternative duties, placement of name on the NTBE list) should only be taken in circumstances where there is no other way to avoid an unacceptable risk to students or staff. We recommend that in most cases sufficient information should be provided to the PSOA to explain the reasons why the decision has been made to remove the employee from their normal workplace or deny them access to casual work. We recognise that in some cases (e.g.: when a police investigation is yet to be completed) this may not be possible.
2. Where possible, the PSOA should have a right to be heard prior to the decision being made to impose such risk management measures, and, in the event of an urgent decision to remove an employee, there should be a right to be heard within seven days of the decision being made. We recognise that in some cases this may not be possible.
3. We recommend that the most serious interim risk management decisions (suspension with or without pay, direction to perform alternative duties, placement of name on the NTBE list) should be made in the same way as final decisions about serious misconduct. Where such interim measures are not urgent, we are of the view that they should be made by the ED of EPAC in the same panel environment that has been described in Chapter 7. We acknowledge that in some circumstances the ED of EPAC will need to make these risk management decisions urgently. In such circumstances, we can see no reason why such decisions should not be confirmed by the ED after consultation in a panel environment.
4. We recommend that when an interim decision has been taken to remove an employee from the school environment, whenever possible, school managers should be provided with the best estimate of how long the investigation is likely to take. School managers should be kept informed on a regular basis of the progress of an investigation and anticipated timeframes. We recognise that in some cases this may not be possible.
5. We recommend that suspension without pay during the investigation of allegations of misconduct should occur only in the most extreme cases where there is overwhelming evidence of guilt of a serious criminal offence that renders the employee unfit to resume employment at any time. It should not be sufficient that the employee has been charged with a criminal offence, without a consideration of the strength of the evidence implicating the employee in that offence.
6. EPAC should continue to issue other directions to PSOAs to safeguard the integrity of their investigations and for the protection of complainants, alleged victims and the school community generally. In the event of a breach of a direction coming to the attention of EPAC, swift action must be taken. This may require an employee being placed on alternative duties or, in extreme cases, suspension. Letters of direction should clearly warn PSOAs that breaches may result in such action.

CHAPTER 10

REVIEWS AND APPEALS

There is no right of internal Departmental review of any EPAC decision, as neither the *Teaching Service Act 1980* nor the Regulations create a right of review. The procedural guidelines state that there is no right of internal appeal of a decision as to disciplinary action. However, where misconduct has been found and disciplinary action taken against a school professional (teacher, Principal, DEL), there is a right of appeal to the IRC and the possibility of an application to the Supreme Court on a question of law. Administrative staff have an avenue of appeal to the Government and Related Employees Appeal Tribunal (GREAT). An appeal to the IRC involves a complete rehearing of the merits of the case. The IRC examines whether the Department's decision has been "harsh, unjust or unreasonable". Appeals to the IRC are lengthy, costly (where lawyers are involved) and involve the calling of witnesses. The parties are generally represented by lawyers. Applications to the Supreme Court can only be made on a question of law, including where there has been a denial of natural justice or where improper or irrelevant considerations have been taken into account in decision-making.

However, as described in Chapter 2, there are in fact informal avenues of internal EPAC review. If an employee requests a review or if a complaint is received from another party (such as the industrial union or professional association), the EPAC Executive Director (ED) makes a determination whether or not the matter will be reviewed. The ED in most cases makes the decision whether or not her own decision is to be reviewed. If she permits a review, she has determined that the reviewer in most cases is the EPAC Director of Systems and Practices, who reports directly to her. EPAC considers that there is sufficient separation between the ED and the Director of Systems & Practices to make this appropriate. If the decision for review was made by an EPAC Team Director, it will be reviewed by a different Director.

Although there is this informal avenue for review of decisions, EPAC does not advise those against whom adverse decisions have been made of the possibility of a review. This is because it is a totally discretionary practice and EPAC does not consider that it has any obligation to provide such advice to employees or their representatives.

EPAC has acknowledged the obvious flaws in this informal system of review. They have conceded that subject to appropriate resourcing and training, EPAC would not be opposed a review by someone outside of EPAC.

Over the last three years, the Director of Systems and Practices has conducted 25 reviews in response to requests and complaints from those against whom decisions have been made, parents, and the NSW Ombudsman. We were informed that these decisions all concerned findings of reportable conduct.

The NSWSPC submitted that this Review consider a system for internal reviews of EPAC decisions, as the current policy states that any decision made by the ED of EPAC is final.

There is an anomaly in the Department's approach to complaints about EPAC decisions compared to consumer complaints by dissatisfied school community stakeholders. The former have no right to a review of a decision whereas the latter do under the Department's complaints handling policy. The Policy says:

"A complainant can request a review of a complaint outcome, which should be done within 10 working days from the decision, and will be carried out by an independent person and a person of equivalent or more senior level within the department who has not previously managed the complaint."

EPAC has said that there are significant differences between dealing with a consumer complaint and dealing with misconduct findings made against an employee following a disciplinary investigation. Each process entails different considerations and the ultimate aim of each process is different. In a consumer complaint process, the ultimate aim is to try to resolve an issue in a way that allows the parties to move forward and to improve the service that the Department provides. An employee has an opportunity to respond to allegations of misconduct and to make submissions on the proposed outcome, whereas consumer complainants generally do not.

EPAC has acknowledged the shortcomings of the current informal, discretionary system of review of decisions in misconduct cases. They have said they would not be averse to a new system in which someone outside EPAC conducts the review, such as a senior officer from outside the Directorate or a Deputy Secretary. However, they point out that EPAC would require significant additional resources if PSOs were entitled to an internal review. They also submitted that, given the numbers of matters dealt with by EPAC, senior officers from other divisions of the Department may well not have the time or resources to undertake such reviews. If reviews were spread around different senior officers, it would probably result in inconsistent decision making.

We agree with the submissions that have been made by EPAC about the difficulties that may arise if there was a right of review by a senior Departmental officer outside of EPAC.

Industrial Relations Commission

EPAC told the Review that:

"Since the implementation of the Guidelines, not one disciplinary decision for misconduct has been overturned on appeal [in the IRC]. Decisions have either been upheld or matters have been settled prior to or during hearings".

This was confirmed after we asked EPAC for a summary of the matters that have gone to the IRC on appeal.

For the period April 2016 to May 2019 the following matters were the subject of an appeal by the employee to the IRC. Apart from a few matters yet to be heard and one dismissal, all other matters in the IRC were either settled or discontinued:

- Teacher lodged a Public Sector Appeal in the IRC against the decision to reduce her salary. The matter was resolved by way of a confidential Deed of Release following conciliation.
- Principal lodged Public Sector Appeal against decision to dismiss in the NSW IRC. Principal discontinued proceedings part way through the hearing.
- Teacher lodged Unfair Dismissal Application in the NSW IRC. Teacher discontinued application on first day of hearing.
- Deputy Principal lodged Application for Unfair Dismissal in the NSW IRC. 10 day arbitrated hearing. IRC handed down decision dismissing application.
- SLSO lodged Unfair Dismissal Application in the NSWIRC. Matter settled by way of confidential Deed of Release prior to conciliation.
- Temp SLSO lodged Public Sector Disciplinary Appeal against decision to dismiss. Appellant discontinued proceedings prior to conciliation.
- Temp SLSO lodged Unfair Dismissal Application in the NSW IRC. Matter resolved at conciliation subject to confidential Deed of Release.
- Teacher commenced Unfair Dismissal Application in the NSW IRC. Matter resolved at conciliation subject to confidential Deed of Release.
- Teacher commenced Unfair Dismissal Application in the NSW IRC. Matter resolved on a confidential basis on day two of arbitrated hearing.
- Assistant Principal lodged Public Sector Appeal against decision to demote to classroom teacher. Matter listed for hearing in late June 2019.
- Principal lodged Public Sector Appeal against decision to demote. Matter is listed for 4-day hearing in September 2019.
- Temp SLSO lodged Unfair Dismissal Application in the NSW IRC. Matter programmed for hearing of jurisdictional argument.
- Temp teacher lodged an application or Unfair Dismissal in the NSW IRC. Matter not yet programmed for hearing.

On one view, EPAC's record in the IRC might be seen as an indication of excellence in decision-making. On the other hand, it might be interpreted as EPAC being too risk averse in its decision-making, or too ready to settle matters in the IRC.

By way of comparison, the decisions of the Office of the Children's Guardian (OCG) are sometimes overturned in the NCAT. The delegate of the OCG told the Review that staff of the OCG gain insight from these decisions and apply any lessons from such cases to their decision making. In Victoria, there is a right of appeal to the Disciplinary Appeals Boards that hears and determines appeals in relation to decisions of the Secretary concerning unsatisfactory performance, misconduct, and serious misconduct by employees in the teaching service. We were informed by the Victorian equivalent of EPAC, the Employee Conduct Branch, that approximately 10% of appeals to the Disciplinary Appeals Boards are successful. This appears to us to be a good indication that the Victorian Employee Conduct Branch has set the bar of acceptable conduct at the right level.

EPAC has acknowledged that it is not desirable for there to be no decisions against the Department in disciplinary matters in the IRC. There is value in having matters proceed to a full hearing and having a decision handed down by the IRC. Each published decision allows the Department to get feedback as to the standards of behaviour of its employees and the appropriateness of decision-making. Because proceedings in the IRC are held in public, IRC decisions remind all staff of what are the required standards of behaviour and what are the potential consequences if their behaviour falls short of those standards.

It was submitted by EPAC that EPAC staff are provided with summaries of relevant cases in the NSW IRC. However, those former and current EPAC employees who made submissions to the Review stated that this was not the case. This confirms the need for more formalised continuing learning and development opportunities for staff within the EPAC Directorate.

ANALYSIS AND RECOMMENDATIONS

We are of the view that the current system of informal, discretionary reviews of decision made by EPAC has substantial flaws. Any review system, even an informal one, which generally relies upon the original decision maker to decide if there is to be a review, and then allocates such a review to a subordinate who works directly under the original decision maker, is seriously deficient and liable to be criticised. It is very much a case of “the squeaky wheel gets the oil”. This Review gained the impression that it is much more likely for an EPAC review to be granted if representations are made by a local Member of Parliament, or the union, or a professional association, or if there has been an enquiry by the Ombudsman’s Office.

We are not in favour of creating a right of review of EPAC decisions in misconduct cases. Rather, we feel that it is important for EPAC to get their decisions right in the first place. If the steps and processes that we have recommended in other chapters of this Report are implemented, we are of the view that the standard of decision-making in EPAC will be substantially improved and that employees of the Department and their representatives, as well as school communities and the public, will have much greater confidence in the whole process. There is an established avenue for appeals to the IRC which involves a complete rehearing by an independent tribunal. There are also limited possibilities for application to be made by an aggrieved party to the Supreme Court in cases where there has been an error of law. For all of these reasons, we do not accept that there should be a right of internal review.

We are of the view that it is not necessarily a good thing that there are no decisions against the Department in the IRC. In a good and robust system there should be some challenges to decisions that are successful on appeal. The absence of any successful appeals may mean that the decision-making is unduly lenient, or that cases are being settled too readily in the IRC prior to a hearing on the merits. It is a bit similar to the situation in the criminal courts where the DPP pursues criminal charges where there is “a reasonable prospect of conviction”. The DPP expects a proportion of cases to result in acquittal. That does not

mean that the DPP is prosecuting too many cases. A healthy system is one in which there are sometimes successful appeals. This is a way in which the Department can refine its approach to misconduct cases. The absence of any successful appeals means that there is no yardstick with which to measure the correctness or otherwise of the Department's approach to misconduct cases.

RECOMMENDATIONS:

1. We recommend that the present system of discretionary internal reviews of EPAC decisions in misconduct cases should be abolished. We believe that it is important for EPAC to get decisions right in the first place. If the steps and processes that we have recommended in other chapters are implemented, we are of the view that the standard of decision-making in EPAC will be substantially improved and that PSOs, school communities, and the public will have greater confidence in the whole process. There are existing avenues of appeal, including to the Industrial Relations Commission, which involve complete rehearing by an independent tribunal.
2. We would encourage the Department to take a more robust approach to cases in the Industrial Relations Commission. It is not necessarily a good thing that there have been no successful appeals in the IRC. A proper and robust system of investigating and addressing misconduct should result in some matters being successfully appealed in an industrial tribunal. This will ensure that EPAC is setting the bar of acceptable conduct at an appropriate level.

CHAPTER 11

MANAGING CONFLICTS OF INTEREST

Internal school disputes (including allegations of bullying)

The Review received submissions from both alleged victims (AVs) and Persons the Subject of Allegations (PSOAs) that there have been local management (LM) complaints, particularly of bullying, that have been dealt with by their Principal or DEL, and that the Principal or DEL had a close and long-standing working relationship with one of the parties, or both, to an extent that impacted on the integrity and objectivity of the investigation and its outcome. Even Principals and DELs who have had to deal with these issues have expressed concerns about this problem of perceived bias in local management of workplace conflict between staff.

EPAC says that this should be managed as would be any conflict in the workplace by local school managers. The Department's staff complaints procedures provide guidance about how to effectively manage these kinds of conflict. The strategies to manage these workplace disputes depends upon the individual circumstances and the people involved. Principals have the duty to manage their staff, and it is not appropriate for them to abrogate this duty by passing it on to EPAC. Where managers feel that they do not have sufficient resources to deal with a particular problem, their DEL is the person who should be the first port of call. Moreover, where workplace managers are concerned about a perceived conflict of interest, they can use the services of an alternative Principal or DEL who has had no prior involvement with the people concerned. These are no different to workplace conflicts and disputes in any work environment, public or private.

EPAC does not, and should not, become involved in workplace disputes that are more suitable for resolution by school managers, who can deal with such problems expeditiously and with the benefit of local knowledge. EPAC has, and in our view should continue to only become involved where there is an allegation of misconduct or misbehaviour that might warrant formal disciplinary or remedial action (see Chapter 7). Other workplace misbehaviour should be dealt with by local managers. It is not the role of EPAC to shield a manager from challenging responsibilities inherent in their role.

EPAC investigations and decision making

We received several submissions alleging that EPAC investigators had remained in a matter despite having a personal connection with one of the parties or a significant witness. The conflict of interest was eventually resolved by appointing a new investigator, but it would appear that in several cases this may have only occurred after repeated requests from the aggrieved party.

A more serious situation could arise where an allegation of misconduct is made against a Departmental officer of a rank equal to or higher than the ED of EPAC. The New South Wales Secondary Principals' Council (NSWSPC) has submitted that:

“The Executive Director EPAC does not have the authority to be involved in disciplinary matters for DoE officers at the same rank or above which means complaints procedures for senior DoE officials are unclear. To ensure procedural equality for all DoE employees there needs to be a clearly articulated policy and process for the investigation of disciplinary matters regardless of the seniority of the position held”.

EPAC responded to this by saying that the ED does have the authority to investigate disciplinary matters involving Senior Executive Officers of the Department, and that exactly the same investigative procedures would apply to such allegations. The ED has the delegation to deal with all allegations, but is restricted in terms of disciplinary action because she does not have the delegation to dismiss a Senior Executive. Only the Department's Secretary can dismiss a Senior Executive. This is common practice across the NSW Government. In fact, a Senior Executive may have their contract terminated by the Secretary of the Department without the same protections available to public service staff. We were informed that in fact the ED of EPAC has referred decision-making concerning allegations of misconduct against Senior Executives to the Deputy Secretary, Corporate Services for decision.

We were informed that over the past three years there have been only 4 cases of allegations of misconduct at the Executive Director level that proceeded to investigation. .

ANALYSIS AND RECOMMENDATIONS

We are of the view that there should be formal documentation that provides for investigation and decision-making in cases of allegations of misconduct by Senior Executives in the Department. We suggest that the EPAC Executive Director (ED) should never be involved in decision-making in such cases, as it would require her to take disciplinary action against someone at her own level of seniority or above. Good practice in the public sector dictates that this is highly undesirable. However, we can see no reason why the ED should not play a role in supervising the investigation of such matters. Where there are extreme issues of confidentiality in such investigations, outside consultants may well be the only way to provide adequate protections for those involved. Otherwise, the EPAC ED can ensure that the investigation is restricted to those who are assisting in the investigation. In suitable cases access to documentary records may need to be restricted.

We are of the view that any decision-making in allegations of misconduct by Senior Executives in the Department should, as previously described in Chapter 7, be made in a panel environment, but not by the EPAC ED. The same procedures should apply, but a Deputy Secretary of the Department who is not a line manager of the PSOA should be the delegate to convene a panel and make a decision. That panel should obviously be different

to the one described in the previous chapter. Our suggestion is that the panel should comprise:

- A Departmental Deputy Secretary who is not a line manager of the PSOA (as convener)
- The Department's General Counsel
- The Deputy Secretary HR
- A Senior Executive from another Government Department

Once again, the members of the panel should be provided with all the papers in advance. Once again, the convener should encourage discussion and debate. In this way, confidence can be maintained throughout the Department that a rigorous process has ensured a fair and impartial result.

RECOMMENDATIONS:

1. Internal conflicts and disputes between school staff, including bullying, should continue to be managed by Principals and DELs, who are in the best position to deal with such issues expeditiously and with the benefit of local knowledge. EPAC should continue to only be involved in such matters where there is an allegation that could amount to misconduct warranting disciplinary or remedial action.
2. The Executive Director of EPAC should not be the decision maker in allegations of misconduct involving employees at the same level or at a higher level than him or her. Instead, the decision should be made in a panel environment by a delegate who is a Departmental Deputy Secretary who is not the line manager of the PSOA. We have made recommendations for the membership of such a panel.

CHAPTER 12

THE OTHER FUNCTIONS OF EPAC: SECT, FACT and CHIP

Overview:

EPAC has a major role in the management of performance by professional staff of the Department and the reception and allocation of consumer complaints. These functions are described in chapter 2 and are not the subject of this Review. However, it is of relevance to consider whether or not it is appropriate and desirable for EPAC to continue its involvement with these other functions while maintaining the efficacy and professionalism of its core function in investigating allegations of misconduct.

Staff Efficiency and Conduct Team (SECT)

EPAC has an enormous role in overseeing the management of performance throughout the Department. It has a large team dedicated almost entirely to this function. SECT is supporting the piloting of the Teacher Performance Management and Improvement Project (TPMI) (see Chapter 2). In years past SECT also played a role in assisting Principals to manage low-level misconduct complaints. A description of this role is contained in chapter 2.

Whilst we have been made aware of extensive criticisms of the investigative functions of EPAC, we have received almost universal praise for the performance management functions exercised by SECT. The overwhelming response from stakeholders has been that they have no issues with SECT. This may be partly attributable to the fact that SECT has one deployed Principal and two deployed Deputy Principals (Primary and Secondary). However, our analysis is that the success and popularity of SECT is due to the remarkable qualities of the two people who share the position of Director of this team.

The real question is whether SECT should remain within EPAC, or whether SECT should be allocated to another Division of the Department, such as the Human Resources Division.

Submissions received:

We have received submissions that consideration be given to SECT being moved out of EPAC, because it no longer represents EPAC's core business and is wholly focused on performance issues. It has been suggested to the Review that performance issues may more appropriately be managed in the Human Resources Directorate. Alternately, the NSWPPA suggested that SECT be moved into the SO&P Division of the Department.

EPAC's response:

We spoke individually to both Directors of SECT about this issue. We were told that the independence that SECT presently enjoys by being separate from the other arms of the Department and a part of EPAC is of great benefit to its role in managing performance and disciplining teaching staff. If SECT were to be moved into the HR Directorate or into SO&P,

this perceived independence would be lost. SECT has a proactive, ongoing relationship with Principals. We were told that it would be easier for Principals if SECT was not separated from EPAC.

It is clearly of benefit to both SECT and the investigation teams to have close proximity to one another. Investigators often rely upon the expertise of offices in SECT. There is clearly much synergy between the two functions in EPAC. The independence of SECT from other divisions of the Department is clearly important for maintaining its integrity and perceived objectivity.

Consumer complaint handling: FACT & the CHIP

The Feedback and Complaints Team (FACT) and its functions are also described in chapter 2. The FACT is responsible for receiving and allocating consumer complaints that come to the Department, either by letter, telephone or through the Department's website. The FACT is not responsible for dealing with or responding to complaints – merely for allocating them to the appropriate section of the Department. One of the tasks of FACT is to administer the Complaint Handling Improvement Programme (CHIP) of the Department.

CHIP was introduced by government in July 2016 in 10 Government Departments. EPAC has submitted that this has included the development of:

“A sustainable education and training strategy for principals and school staff, to improve skills and confidence in complaint handling and to support schools to improve the way they engage with school communities”.

The question arises whether the FACT team and the CHIP program should remain within EPAC when EPAC's core function is the investigation of allegations of misconduct.

Submissions received

We received a number of submissions that the receipt and allocation of consumer complaints by FACT should be removed from EPAC, leaving EPAC to deal with its core business of investigating complaints of misconduct. For example, the New South Wales Primary Principals' Association (NSWPPA) has submitted that:

“Employee Performance should be rightly overseen by a more predominately teaching background directorate - School Operations and Performance, with input from the Human Resources Directorate. Most complaints and feedback are school-related, so it should be under the ownership of School Operations and Performance. Corporate Services may have representation in this unit for complaints pertaining to non-school based staff... School Operations section of the DoE, not EPAC, should be the owner of complaints handling. EPAC personnel should be dealing with serious misconduct and child protection.”

EPAC's response

We asked EPAC whether, in their view, the receipt and initial consideration of consumer complaints, the allocation of such complaints to appropriate sections of the Department, and the training of DoE staff is best done by EPAC. Their response was to say that the location of the FACT will largely depend on the future governance arrangements with respect to complaints. The FACT works closely with other EPAC teams, as there is significant overlap between the team's work and EPAC's investigative work.

Conversely, if FACT were located within School Operations and Performance (SO&P), this would present an opportunity to work more closely with the senior executives in that Division. This may also promote a stronger sense of ownership of DELs' and principals' role in managing complaints. However, there is a risk that this might focus the team's work on schools to the exclusion of other business units within the Department, and it might create an expectation that the team would be directly managing complaints. This would unduly stretch the team's resources and be contrary to the Department's position on local complaint management.

It is EPAC's strong view that complaints, whether made by staff or by consumers, are best managed as close as possible to the location of the complaint, because the successful resolution of complaints relies heavily on the involvement of line managers with local knowledge and a commitment to restoring relationships. If consumer and staff complaints were to be managed centrally, there is a risk that this could result in missed opportunities to rebuild critical relationships between school employees and between consumers and the school communities.

It is EPAC's view that the role description of DELs would benefit from a clearer articulation of the responsibility that DELs have as line managers to assist Principals to manage complaints.

ANALYSIS AND RECOMMENDATIONS

The location of SECT

The Directors of SECT both expressed the view to us that it is important that SECT remain within EPAC. The main reason they advanced was that by being located within EPAC they are viewed as possessing independence from the mainstream Department and not aligned with the bureaucracy of the Department. This independence is important for administering teacher improvement programs and gives SECT the cloak of independence when advising Principals and DELs.

The work of SECT has been so well received and admired that we consider it would be highly undesirable and retrograde to move SECT from its current position within EPAC.

The location of FACT and CHIP

The location of FACT will largely depend on the future governance arrangements with respect to complaints. The FACT works closely with other EPAC teams, as there is significant alignment between the team's work and EPAC's role more generally, and both functions work across the Education cluster. This would be further enhanced with the addition of specialist advisory staff to provide advice and support to principals on the management of complaints. This would ensure that principals and DELs would receive consistent advice around the management of these complex issues.

Conversely, the team being re-located within SO&P would present an opportunity to work more closely with SO&P senior executive to implement agreed strategies. There is also the potential that this would promote a stronger sense of ownership of DELs and principals' role in managing complaints. However, there is also a risk that this would focus the team's work on schools at the exclusion of other business units within the education cluster, and that there would be an expectation that the team would directly manage complaints. This would further stretch the team's resources and would be contrary to the department's position of local complaint management.

RECOMMENDATIONS:

1. We recommend that SECT remain in its present location within EPAC. It is so universally admired for its good work that it would be quite contraindicated to move it to one of the other Divisions of the Department. The SECT has a number of employees with recent school-based experience. At the present time these employees are available to the EPAC investigators to gain a school-based context when conducting investigations. If SECT were to be removed from EPAC, this resource would be removed from investigators.
2. We can see no logical reason why EPAC has been given the role of receiving and allocating consumer complaints to other Divisions of the Department. Consumer complaints are quite different to allegations of misconduct. We are of the view that FACT and the CHIP program should more logically be placed elsewhere in the Department, such as in the HR Division or even the SO&P Division. This will allow EPAC to focus more intensely on its core business of managing misconduct and staff performance.

CHAPTER 13

PROFESSIONAL DEVELOPMENT AND TRAINING

This chapter considers two different aspects of professional development and training: that of EPAC staff; and that provided by EPAC to local school managers.

TRAINING AND DEVELOPMENT OF EPAC STAFF

If EPAC investigators and decision-makers are going to function efficiently, professionally and consistently, it is important for them to have good quality professional development and training. We have already stated in Chapter 7 our view that it is of considerable importance for EPAC to have a database of previous cases in order to assist in report writing and decision making at every level. This is just one aspect of continuing professional development. Other areas that are suitable for continuing education of EPAC investigators and decision-makers include:

- Interviewing skills (particularly of children)
- Investigation skills
- Evidence gathering and analysis skills
- Report writing skills
- Updates on disciplinary cases involving employees in other agencies.

EPAC admitted to us that, because of heavy caseloads, there has been only limited time for team Directors and Principal Investigators to devote to professional development of their teams. However, EPAC maintains that from time-to-time there has been in-house training provided to their employees in the following:

- The work of the PIT
- Interviewing children
- Report writing
- Drafting allegations
- Leadership and mentoring for Principal Investigators.

Applications by EPAC staff for external training are generally approved. Directors and Principal Investigators are said to actively engage in supervision and mentoring of their teams, particularly with new employees. However, EPAC admits that all of this admirable educational activity has been limited by the sheer volume of cases.

The information that we have gained from former and current employees of EPAC is that most of them learn on the job through sheer experience, and that the amount of mentoring by team Directors and Principal Investigators varies considerably from team to team.

EPAC Induction programs

It is of critical importance that EPAC have a good induction procedure for new staff. EPAC admitted that the most recent induction program was conducted from 16-20 April 2018 and that the last training package for “Interviewing of Children” was delivered from 23-27 April 2018. In the meantime, there have been new staff that have not had the benefit of any concerted induction program.

The PSA have submitted that:

“A more comprehensive induction process for staff new to the Directorate about the use of tools, system, process and practices would be of great assistance”.

EPAC agree that a more comprehensive induction process would be helpful, however, information regarding the use of tools, systems, processes and practices is provided in face-to-face training and in documentation. They maintain that each new investigator is mentored by a more senior investigator. EPAC admit that there is room for improvement. We agree.

Programs for EPAC staff in the development of skills in evidence gathering, testing and assessing

The ability to plan and undertake investigations and the capacity to test witnesses’ reliability are fundamental requirements of investigators at every level. We were told that most investigators appointed to EPAC have had prior, relevant investigative experience and expertise in gathering and assessing evidence.

The EPAC procedural guidelines confirm the requirement for investigators to be objective and not to prejudge matters (see for example section 7.8.2.2). This requires investigators and decision-makers to thoroughly test the strength, reliability and consistency of evidence.

In terms of assessing evidence from children and young people, all new staff should undertake a practical 4-day module on “Interviewing Children” as part of their Induction Program. However, not all new employees have the benefit of participating in the induction program. Topics covered in this module include:

- Optimal interviewing techniques
- Interview frameworks
- Guidelines for talking to children
- Interview planning
- Assessing competence
- Assessing a child's understanding of truth and lies (including the components of s13 of the *Evidence Act 1995*)
- Structuring the interview and closing the interview
- Checklists, scaffolds and sample questions are also provided.

For those who participate in the EPAC induction program, it includes training in report writing that stresses the importance of testing and critically analysing evidence. In the “Investigation Report Writing” module of the induction program, investigators are instructed in the following aspects of report writing:

- Critically analyse the evidence gathered
- Say why the evidence matters by critically considering context
- Link already stated facts to your eventual judgements/recommendations (to the Decision Maker)
- Explain the weight you assign to the evidence provided
- Explain how the evidence is, or is not corroborated
- Explain how the evidence supports, or refutes, the allegation
- Discuss, reconcile and resolve any conflicting facts
- Ensure arguments (interpretation of what happened) are well structured and clear
- Include any counter arguments
- Address questions of bias, perception, competence and veracity and include conceptualised comments to help the reader understand arguments or conclusion (to sustain or not sustain).

We are of the view that these induction courses are excellent, and an essential feature of ensuring that new investigators have sufficient basic training to do their work.

Training of EPAC staff in consistency

We have received many submissions that the standard of report writing varies considerably between investigators and between EPAC teams. We have also received many submissions that there are inconsistencies between the approaches of different teams of investigators, due to the fact that there is little coordination between them. It has been suggested that there should be additional opportunities for professional development within EPAC in order to increase consistency of approach between teams. For example, the PSA has submitted:

“The workload and demands on the teams does not create an environment that is conducive to a directorate wide discussion about practice. Given the skill and experience of the staff across cases from the straight forward to incredibly complex it would be invaluable to hold practice review sessions across the Directorate.”

EPAC has responded by pointing out that there are Guidelines and other educational tools for investigation reports. EPAC has insisted that there is rigorous ongoing mentoring of team members by their managers. EPAC says while workload demands have increased, new strategies have been implemented to manage the issue of consistency. They cite: the introduction of the PIT; collaborative work between teams on a formal and informal basis; informal case discussions and consultations about systems and practice; joint interviewing; and discussions at staff meetings.

We have received contrary views from former and current employees of EPAC that there is very little contact between teams, and that in fact there is a very vigorous spirit of competition between EPAC teams that discourages cooperation and coordination.

Mentoring of EPAC staff and case reviews

EPAC has said that monthly reviews of individual cases by team Directors take place with every individual officer and that they are recorded in *Resolve*. We are skeptical about this claim, as we have been informed that in several EPAC teams case reviews are infrequent and cursory. In our review of about 40 EPAC case files, we noted that many case reviews were noted in *Resolve* with less than half a dozen words, and sometimes there was a complete absence of any recording of a case review at all. The Review believes that in some EPAC teams case reviews amount to token entries on *Resolve* for the sake of the database and are not genuine, comprehensive reviews. This is probably due to a combination of the excessive caseload of investigators and an inability of some team Directors to maintain effective supervision of their team members.

We were also told by EPAC that there are 'Director decision-making meetings' periodically held in which there are discussions about the cases which the Directors have to make decisions about. We have been informed, however, that such meetings rarely occur and that they have not been successful in achieving robust discussion about matters.

Management skills of EPAC managers

In various chapters of this Report, we have highlighted some failures in management. We are of the view that there should be more rigorous training of Directors and Principal Investigators in management skills and managerial responsibilities.

PROFESSIONAL DEVELOPMENT AND TRAINING OF OTHER DEPARTMENTAL EMPLOYEES

Training in investigations

EPAC have a major role to play in the education of school managers throughout the Department to develop their skills in the investigation of low-level misbehaviour. The Department's School Operations and Performance Division (SO&P) submitted that:

"In the areas of Performance and Conduct there is a belief that there has not been clear collaborative practice regarding joint training or issue management between EPAC staff and Principals/Directors, Educational Leadership."

Their submission suggested that local managers who are required to conduct investigations in low level complaints are not sufficiently educated in the standards and methods of investigations.

EPAC's response is that the investigation of poor conduct is a basic supervisory function that does not require formal investigation skills. In EPAC's view, most Principals and school Executives have sufficient skills to do the following:

- Communicate with their staff;
- Establish the extent of misbehaviour;
- Set standards and expectations of behaviour;
- Monitor future conduct;
- Assess whether future conduct may require intervention by EPAC.

EPAC point out that if training of school managers is required to enhance these functions, they would require additional resources to do so, as this is not part of EPAC's core business. We agree.

General training of school managers about reporting misconduct and misbehaviour, including the reportable conduct scheme

EPAC has said that it receives many requests each year to provide education and training directly to school leaders about the role of EPAC and the responsibilities of school staff in relation to reportable and other misconduct. In 2018, EPAC conducted two large-scale training days. These days were attended by a total of almost 700 school leaders and DELs, and the feedback these participants provided was largely positive. In 2019 EPAC is planning to hold two further training days for up to 250 participants each day. We understand that the first training day is already highly subscribed.

EPAC have submitted that meeting requests for education and training of school managers is highly resource intensive, particularly when EPAC is not specifically resourced to provide such education and training. They point out that such requests potentially come from up to 2200 school Principals and their Executive teams. EPAC recognises that refusing such requests sends a negative message and that they endeavour to meet such requests, despite the risk that to do so shifts resources away from their core function of investigations.

We understand that EPAC is currently funded to meet only its operational responsibilities in its core functions. EPAC says that budget enhancements for training of school managers would ensure that requests for training courses and the creation of e-learning resources could be properly met.

Despite the courses that EPAC have and are providing to Principals and DELs, we have received a number of stakeholder submissions that EPAC staff do not have adequate time to properly participate in educational programs for Principals and DELs. For example, the NSWPPA has submitted that:

“Access to EPAC personnel for various forums and face-to-face training is extremely limited or non-existent. [We recommend that] EPAC should engage in whole-of-

state face-to-face delivery at DoE Network meetings, Regional Principals' Conferences and/or Area Principals' Council meetings. This will reflect positively on Public Education as the heightened awareness by staff of all EPAC matters will ensure a better understanding and practices."

EPAC have stated that they would welcome the opportunity to make their staff available to Principals' Network meetings, Regional Principal's Conferences and Area Principals Council meetings. At the moment, they try to respond to such requests for presentations at Principals' Network meetings. These requests are for a senior officer to present. Sometimes the groups are as small as 20. This is a rather inefficient use of EPAC resources.

We understand that training by EPAC employees is very resource intensive. Providing an EPAC team Director to talk to a small group of Principals, sometimes only for an hour, involves a Director travelling to the venue, presenting and returning to work. This can remove a Director from his or her core duties for at least half a day, and sometimes a full day. Once again, this is a rather inefficient use of EPAC resources.

EPAC have said that they are open to a co-ordinated approach from School Operational Directorates when requesting EPAC to provide presentations. In this way, EPAC would be able to maximise the impact of presentations and making them appropriate and specific to the needs of Regional Directorates. Clearly, to fully meet these requests, EPAC would need to have an enhancement of their budget. This is considered further under "Analysis and recommendations".

E-learning

The New South Wales Secondary Principals' Council (NSWSPC) told the Review that Principals would benefit educationally the most from working through factual scenarios. They submitted that conferences provided by EPAC in Sydney are not financially feasible for those in regional or rural NSW. Therefore, they suggest, EPAC is not serving the needs of those parts of the State. NSWSPC would also like to see updates and maintenance of online professional learning.

In 2015, a Deployed Principal was appointed to SECT with the specific purpose of rolling out an e-learning package across the state for Principals and Directors Public Schools. The e-learning package was jointly developed by EPAC investigators and SECT officers, with input from the EPAC Reference Group. The package included presentations on:

- EPAC policies and procedures,
- How to manage poor conduct,
- Underperformance and complaints management
- Step-by-step instructions on how to meetings with staff members about conduct,
- Record keeping
- Managing difficult conversations.

In 2016, the SECT developed the following three modules:

- Ethical decision-making
- Performance management
- Complaints management.

A module on “Fair warning, fair action” has also been developed and awaits endorsement. School Executives aspiring to be Principals are required to complete and 18 Principal Credential (of which the above three modules from EPAC form part) before applying for Principal positions.

We are of the view that these activities should be continued and updated on a regular basis by EPAC. It is quite clear that current resources do not allow EPAC to do this.

Anonymized publication of EPAC cases to the Department

We understand that the only information that the Department publishes about the investigation and management of misconduct by employees of the Department are annual figures about the number of employees terminated during the relevant period, and a general statement of the reasons why. This always gives rise to media interest.

We are surprised that there is no practice of regularly reporting anonymised investigation decisions and outcomes to employees of the Department or to the public. One teacher told the Review that the UK Department of Education has a weekly email list outlining the most serious recent cases of teachers who have been found to have committed misconduct.

We are of the view that similar anonymized information in New South Wales about serious and non-serious cases of misconduct would achieve a number of important benefits, including:

- Engendering confidence in school communities that EPAC is fulfilling its functions in a transparent, consistent and fair manner
- Educating employees of the Department about what are appropriate standards of conduct and behaviour
- Educating school managers and DELs about current standards of conduct and behaviour so as to facilitate them in the management of their staff.

EPAC agrees that this would be very helpful. Plans to do so are now part of EPAC’s communications strategy (currently under development) which is being prepared by EPAC’s recently appointed Principal Project Officer, Systems & Practice.

ANALYSIS AND RECOMMENDATIONS

Training and development of EPAC staff

In order to maintain the professionalism of EPAC staff, it is essential that there be regular opportunities for induction, training and continuing professional development in the following areas:

- Interviewing skills (particularly of children)
- Investigation skills
- Evidence gathering, testing and analysis skills
- Report writing skills
- The threshold for misconduct
- Updates on disciplinary cases involving employees in other agencies.

We are of the view that EPAC should be sufficiently resourced so that it can provide induction and continuing professional development in these areas. The employment of a suitably qualified Education Officer will go a long way towards providing EPAC with these opportunities for investigators. We are of the view that funding should be made available by the Department to EPAC for the employment of a suitably qualified Education Officer so that EPAC can provide appropriate induction courses for new staff and continuing professional development for its existing staff.

We are of the view that the very best training and development of EPAC staff should occur at regular case reviews at which managers discuss investigation files with investigators. We perceive that case reviews at the moment vary enormously between the different investigation teams. In some they are of great value, whilst in others they are of nominal value. We recommend that management insist on all team Directors conducting regular case reviews at least once each term in which real value is added by the Director. This will be of great value to the continuing development and training of investigators.

Training and development of other departmental staff

We believe that EPAC is the obvious source of professional training and development for school managers and DELs in the development of skills in the investigation and resolution of low-level misbehaviour by school staff. In addition, all Principals, DELs and school Executives would benefit from receiving adequate training and development in how to make complaints of misconduct and reportable conduct to EPAC. This can be achieved not only by EPAC presenting at meetings and conferences, but also by providing e-learning packages on the Department's website. The packages and modules prepared by SECT in 2015-16 provided a good model for educational packages.

At present, EPAC is not financially resourced to provide such education and training. The employment of an EPAC Education Officer will ensure that EPAC can adequately meet requests from school managers and DELs for education and training at events such as

Principals' Network meetings, Regional Principal's Conferences and Area Principals Council meetings. This Education Officer will also be able to develop e-learning modules for the Department's website. This will relieve EPAC team Directors and Principal Investigators from the obligation to attend all such meetings and conferences, which takes them away from their core functions. We are of the view that in order to adequately meet these requests from school managers for education and training, EPAC needs to be funded for at least one suitably qualified Education Officer who can present at such meetings and conferences. Such an Education Officer could also develop e-learning modules for the Department's website.

Publication of anonymized reports of misconduct cases investigated by EPAC

We are of the view that the publication of anonymized reports of misconduct cases investigated by EPAC can only serve to increase confidence in EPAC and raise standards of conduct and behaviour among employees of the Department.

RECOMMENDATIONS:

1. We recommend that EPAC conduct induction training for new staff at least once each year. We are of the view that new investigators would benefit from spending a small amount of time in the classroom of a primary school, a secondary school, and an SSP as part of the induction process for new investigators.
2. We recommend that there be additional opportunities for existing EPAC staff to receive continuing professional development in the areas of:
 - Interviewing skills (particularly of children)
 - Investigation skills
 - Evidence gathering, testing and analysis skills
 - Report writing skills
 - The threshold for misconduct
 - Updates on disciplinary decisions in EPAC and in other agencies and tribunals.
3. As previously stated in Chapter 7, the creation of a database of previous EPAC cases will not only serve as an important basis for consistency in recommendations and decision-making, but will also serve as a resource for the training and professional development for EPAC staff.
4. We recommend that EPAC team Directors and/or EPAC Principal Investigators be required to engage in genuine case management with their team members at least once each term. This is not only an effective management tool, but also a good form of training and development for investigators.
5. We recommend that funding be made available to EPAC for the employment of a high-level Education Officer so that EPAC can provide appropriate induction courses for new EPAC staff and continuing professional development for its existing staff. The employment of an EPAC Education Officer will also go some way to ensuring that EPAC can meet requests from school managers and DELs for education and training

at Principals' Network meetings, Regional Principal's Conferences, Area Principals Council meetings, and other similar meetings and conferences. This Education Officer would also be able to further develop and update e-learning modules for the Department's website. The appointment of an Education Officer to EPAC will relieve EPAC team Directors and Principal Investigators from some of the obligations to attend meetings and conferences, which takes them away from their core functions.

6. We recommend that EPAC be encouraged to publish anonymized accounts of cases of misconduct that it has investigated, together with disciplinary or remedial action that has been taken. This will be a significant educational tool for all employees of the Department.
7. We recommend that there should be more rigorous training of Directors and Principal Investigators in management skills and managerial responsibilities.

CHAPTER 14

MISCELLANEOUS ISSUES

ALLEGATIONS OF BULLYING

It appears to the Review that there has been an enormous increase in allegations of bullying in recent years, and that some of the frustrations directed at EPAC concern their treatment of allegations of bullying. We have received a large number of submissions from individuals and groups of former teachers alleging that they were victims of bullying that went unaddressed. It has not been the function of this Review to consider the merits of any individual complaints or group or category of complaints. This is a facet of EPAC's work that has grown over recent years that continues to create controversy.

Bullying is sometimes used to describe workplace conflict, and allegations sometimes arise in response to reasonable management action to deal with poor performance. Consequently, as part of the intake process, EPAC critically assesses the specifics of the conduct alleged and applies the *'Assessment Tool: Allegations of Bullying, Discrimination and Harassment'* policy to determine whether relevant thresholds have been met.

EPAC will only investigate 'bullying' allegations if the conduct alleged is sufficiently serious to potentially amount to misconduct. Bullying complaints received by EPAC that do not amount to misconduct are recorded as Enquiries and are frequently remitted to local managers for resolution, however EPAC does not monitor the progress or outcome of those matters. It is appropriate for many allegations of bullying to be returned to the Principal, DEL or other school manager to be resolved in the school community. EPAC has attempted to address requests from Principals and other workplace managers for support in managing these challenging complaints. For example, EPAC has provided training on managing bullying complaints as part of the biannual training for Principals and DELS (in the staff complaints module). EPAC investigators and Directors also remain available to provide advice to school leaders on the management of these complaints.

In assessing EPAC's handling of bullying complaints, it is important to note the whole of government strategies to manage bullying concerns led by the Public Service Commission and Safework. The Public Service Commission's 2017 *Positive and Productive Workplaces Guideline: A Guide for the NSW Public Sector to Prevent and Managing Unreasonable Behaviour and Workplace Bullying* emphasises the important role to be played by workplace managers in responding to allegations of bullying, and outlines a range of strategies to prevent, identify and respond to bullying concerns. For example, the Guidelines state (at page 10):

"The aim should be to take informal action as soon as unreasonable behaviour occurs and before it becomes an entrenched pattern. Formal investigation will determine the facts and the need for any appropriate

interventions or sanctions. However, it will rarely achieve the desired outcome of mending workplace relations.

Formal action necessitates the person against whom the allegation has been made taking a defensive stance given the possibility of sanction; the complainant is rarely satisfied with the outcome; the process is liable to generate conflict between different groups within the team; and there is rarely a lasting positive effect on the incidence of bullying over time.

Formal action is the right approach if matters have progressed to the point of an allegation of serious harm and/or there is no prospect of returning to reasonable relations through informal action. In these cases employees should be supported by management and formal action should be taken.”

In January 2019, the NSW Government response to the *Parliamentary Inquiry into Emergency Services Agencies* (which examined the management of bullying allegations) reiterated the importance of the timely resolution of workplace complaints as close to the source of the complaints as is reasonable in the circumstances.

Responding to bullying concerns extends beyond EPAC and involves other Directorates in the Department, such as Health and Safety, School Operations & Performance, and Human Resources. The Public Service Commission Guidelines confirm that managing reports of workplace bullying is a whole of agency responsibility, requiring a multifaceted approach.

EPAC receives regular enquiries from Principals on issues of staff bullying. Many Principals have expressed concerns that they have been accused of bullying when they endeavour to deal with staff performance issues or when they try to give feedback to staff. Principals have also complained that they have been the subject of bullying from their staff. EPAC has submitted that evidence suggests that the term ‘bullying’ is often used to describe workplace conflict and staff management challenges.

Bullying assessment tool

As a part of its development of staff complaints procedures in 2016, EPAC developed an assessment tool for Principals and DELs to use when their staff raise allegations of bullying. This assessment tool is available to Principals on the EPAC webpage and is also available to PIT staff who provide advice to Principals seeking support with bullying complaints. The assessment tool states that the threshold for a bullying complaint is reached when the alleged conduct is “repeated, persistent, unreasonable, unwelcome, targeted and creates a foreseeable risk to health and safety”. The assessment tool also makes clear that the following do not constitute bullying:

- reasonable requests from a supervisor
- reasonable formal or informal discussions about unsatisfactory performance
- recruitment outcomes
- transfers to other roles based on operational requirements

- other reasonable managerial action or processes that accord with policy, procedure and legislation
- lower level interpersonal conflict.

Allegations of bullying which meet the criteria under the assessment tool are considered by EPAC as allegations of misconduct.

Conclusions

We are of the view that the recommendations we have made elsewhere in this Report will address many of the criticisms that have been made of the Department's responses to allegations of bullying.

SICK LEAVE ISSUES

We have received a number of submissions from school managers highlighting the difficult staffing and educational problems that arise when school staff take sick leave when performance is challenged or a misconduct investigation is commenced. Sick leave will often delay the conduct of an investigation, which means that the school is denied an outcome.

EPAC has noted that there are limited options available to manage teachers whose performance has been affected by mental illness or substance abuse. Such teachers sometimes find themselves subject to allegations of misconduct. These investigations can be challenging, take lengthy periods of time and may not necessarily resolve the issues for the school. EPAC has suggested that a more appropriate pathway for resolution of such situations may be to introduce a "teacher impairment program", which would establish whether a program of supportive intervention may assist the teacher to return to work. Such impairment programs operate for health professionals in NSW.

We believe that the introduction of a teacher impairment program would be a very positive step.

STUDENTS WITH DISABILITY

As noted in Chapter 6, all matters involving students identified as NCCD at intake are referred to the PIT director for final assessment. NCCD students are considered vulnerable because of their disability which is always taken into account when assessing risk.

Some investigators are experienced and trained in this area, while others are not. Specialist support persons are located prior to student interviews. Site inspections of classrooms, play and recreation areas and other rooms (such as time-out and sensory rooms) often occur. Where appropriate, Individual Behaviour Management Plans of students are obtained from schools. Consultation takes place with principals and other school support services to assist

with the assessment and management of alleged misconduct concerning such students. This includes consultation with specialist staff. Investigators often attend Schools for Specific Purposes (SSPs) and special units in mainstream schools when managing an investigation.

We are satisfied that EPAC competently manages investigations involving students with disability.

INTERACTIONS WITH AND ACCOUNTABILITY TO STATUTORY BODIES (OMBUDSMAN AND THE OCG)

OCG

The interactions between the OCG and EPAC also involved the Probity section of the Department. Communications between the OCG and EPAC are well-established and cooperative in approach. The respective liaison officers are the Director, Child Protection Investigations (EPAC) and the Director, Working with Children Check (OCG). The liaison consists of formal meetings as well as ad hoc communication as issues arise. On occasions, EPAC's Principal Legal Officer liaises directly with OCG's Director of Legal Services.

There are many examples of interaction between the two agencies through their joint work on cases. For example, the OCG's case management system directs relevant information to either the Probity Unit or EPAC (e.g. advice about a bar). Similarly, EPAC Directors use the online OCG platform to make mandatory reports about sexual misconduct and serious assaults. We understand that during liaison meetings, the Director of the WWCC has commended the quality of EPAC investigations.

There have been rare occasions when an EPAC decision about misconduct has allowed a PSOA to continue working, and yet the OCG has subsequently decided to issue a bar on the PSOA working with children. The OCG decision may be based on material that extends beyond the EPAC investigation report, to which the EPAC decision-maker was not privy. We accept that it would not be correct to categorise this as a difference of opinion.

Ombudsman

The Ombudsman oversees the processes of investigations of misconduct, but does not have any formal jurisdiction under its Act to challenge findings of misconduct or disciplinary outcomes. However, the Ombudsman has from time-to-time disagreed about whether EPAC should or should not have sustained findings of reportable conduct. As described in chapter 1, in 2018 the Ombudsman's Office reviewed 422 completed EPAC investigations. Of those, there was a suggestion from the Ombudsman's Office that they were of the view that there should have been a different outcome in 24 cases (6%). In addition, in a further 7 cases (2%) the Ombudsman referred a case to the Office of the Children's Guardian (because risk management by EPAC was considered to have been inadequate). The NSW Ombudsman is currently overseeing over 60% of EPAC's investigations.

We are of the view that the above cases where the ombudsman has disagreed with the finding by EPAC do not demonstrate any more than differences in that one would expect in such cases. However, it should be remembered that it is not the function of the Ombudsman to challenge actual findings.

WORKING WITH OTHER DIRECTORATES OF THE DEPARTMENT

EPAC works closely with the HR, Health & Safety and industrial Relations Directorates of the Department. In complex cases, a case management approach is taken which may involve teleconferences between the Principal, the DEL and senior officers from EPAC, HR, IR, Health & Safety and/or Legal Services. Generally, one officer will be nominated as the case coordinator. The location of the case coordinator will vary depending on the primary area of concern.

As at 1 July 2019, we understand that EPAC, Health & Safety and HR will be relocated under a new Deputy-Secretary.

'Fair Warning, Fair Action' (FWFA) policy

A description of the FWFA policy is contained in Chapters 1 and 3.

EPAC submitted that:

“The FWFA process has shifted principals and managers from deploying creative managerial approaches involving communication and support, towards a process of issuing directions to gain compliance. Overall, the FWFA process has diminished the meaningfulness of issuing directions to staff, because they are so frequently used, and their over-use has increased the workload of all staff involved in the process.”

EPAC has said that its role with FWFA, when they are asked to provide advice and assistance in drafting directions to staff, has massively increased their involvement in low-level matters.

The Review has received submissions from EPAC employees that, in fact, since 2018 EPAC no longer provides advice on Complaints Handling relating to low-level conduct matters involving the FWFA process. The advice given is that DELs are to provide this support to their Principals. We are aware that there has been no transition period or training of DELs on how to manage these matters. EPAC has created the online Decision Trees to replace this advice to school managers, however the feedback that we have received from Principals is that the decision trees are not that helpful.

A number of submissions have been made that EPAC has not taken appropriate action after an employee has repeatedly breached FWFA directions. For example, it has been submitted by the NSWPPA that:

“The ‘Fair Warning, Fair Action’ policy remains ineffective in its application. It is time-consuming for Principals and in many cases, lacks an outcome. There is tremendous frustration for Principals when a staff member has demonstrated misconduct, the Principal has followed the process, but EPAC appear to not support further action.”

EPAC has responded that a breach of an EPAC direction is considered to be misconduct and that PSOA are advised of this when directions are issued. EPAC believes that directions are an effective mechanism for managing risk and that breaches of directions are infrequent. PSOAs who breach directions may be placed on alternative duties and in some circumstances even suspended without pay. EPAC maintains that breaches of directions are additional allegations of misconduct that are put to a PSOA and, if proven, viewed as an aggravating circumstance. In some circumstances, PSOAs have been subjected to fines, directions to resign or dismissal as a result of breaching EPAC directions. The *Resolve* database does not allow for the recording of breaches of directions and it has not been possible for EPAC to provide specific numbers of breaches in recent times.

It has been submitted by the Department’s SO&P Division that:

“There is little action taken by EPAC after a Principal has fulfilled the obligations of ‘Fair Warning Fair Action’.... Each incident of alleged misconduct is dealt with in isolation and not in the context of the staff member’s behaviour over their career. This has led to relatively minor consequences being repeatedly applied to difficult staff without escalation of the response by the employer....Principals and Directors, Educational Leadership feel frustrated that staff can receive many letters of direction throughout their career but rarely is there action taken by EPAC to move to demotion or dismissal. Community members who report staff behaviours that breach the Department’s Code of Conduct become angry and feel disenfranchised when they know that multiple breaches have been reported to the Principal, but the teacher remains in the school... [We recommend that] a tool be used to record and track these [warning] letters across all schools, to prevent situations where an employee moves to another school and the process begins again without knowledge of previous letters.

.....

It is believed that in many occasions an employee will continue to act inappropriately [after a Direction has been given] and these subsequent actions are treated as new or first events, rather than a continuation of a prior behaviour.”

EPAC acknowledges that this comment has some merit. In circumstances where an employee continues to engage in conduct contrary to a lawful direction, and this conduct is referred to EPAC, the conduct is examined as a “new event” (but not necessarily a “first”). If the conduct is sustained and found to be in breach of the lawful direction, any proposed disciplinary action will take into account prior sustained conduct, including prior breaches of any directions.

EPAC has submitted to us that the FWFA policy has not been a success, either from the perspectives of students, Principals or EPAC. This is because the FWFA procedure was not accompanied by legislative powers to achieve the expectations of Principals – namely for

the dismissal of employees as a result of the application of the process. Arguably, the marketing of FWFA as a “three strikes and you’re out” procedure was never a legally viable option for the Department. There has been understandable disappointment when staff have not been dismissed after repeated directions or where the whole process has failed because there was a paucity of information on which to base a disciplinary decision.

EPAC sees some merit in DELs having a greater role in managing and taking action in relation to these matters. In most cases, a DEL is in a prime position to guide a Principal in placing an employee on an improvement program, rather than continually issuing directions.

One possible option for improving the FWFA procedure would be to provide DELs with delegated authority to address breaches of directions by making a direct disciplinary decision for remedial action. More serious and repeated breaches of directions should continue to be reported to EPAC.

REVIEW OF EPAC’S PROCEDURAL GUIDELINES

We described the *Guidelines for the Management of Conduct and Performance* (procedural guidelines) in Chapter 1. The procedural guidelines are proscribed under the *Teaching Service Act 1980* (s. 93D) and the *Education (School Administrative and Support Staff) Act 1987* (s. 30). They guide the way in which investigations of alleged misconduct are approached. We have been provided with a draft of proposed new procedural guidelines. We understand that the implementation of these guidelines has been delayed until after this Review.

The Review has made a large number of procedural recommendations that, if accepted and implemented, would require substantial amendments to the recent draft procedural guidelines. We have not attempted to re-draft the guidelines, as this should be done when a decision has been made about which of our recommendations are to be implemented.

ANALYSIS AND RECOMMENDATIONS

We are of the view that EPAC is properly and efficiently dealing with the massive increase in allegations of bullying. We are satisfied that EPAC provides appropriate support to Principals and DELs in this area. We agree that EPAC should only investigate allegations of bullying where the complaint has the potential to amount to misconduct.

We are of the view that EPAC has been responding appropriately to other agencies, including the OCG and the Ombudsman.

We are of the view that the “Fair Warning, Fair Action” policy is not operating in the manner in which it was intended. Cases of repeated breaches of directions issued by Principals are not being appropriately pursued as cases of misconduct. We are of the view that this is something which EPAC has not sufficiently attended to in the past and should attend to in the future.

RECOMMENDATIONS:

1. We recommend the introduction of a “teacher impairment program” to assist teachers with mental health or substance abuse issues to return to the workplace. Such a program has been successful in the health professionals’ field.
2. We recommend that EPAC should play a more significant role in investigating repeated breaches of directions under the “Fair Warning, Fair Action” policy of the Department. This will go some way to restoring confidence in that policy.
3. If the recommendations in this Report are accepted and implemented, the draft Procedural Guidelines should be amended to incorporate suitable provisions in accordance with those recommendations.
