

Alleged Misconduct/Serious Misconduct/Official Misconduct of Staff Guidelines for Processing

General Principles

Fairness

Natural Justice/Procedural Fairness requires that an employee facing a formal allegation of misconduct be given an opportunity to be heard on:

1. the facts of the matter;
2. the conclusions being drawn from the facts;
3. the seriousness of any act of misconduct;
4. the severity of the penalty that could be imposed where it is concluded that misconduct has occurred, and
5. any mitigating factors.

Confidentiality

Confidentiality of all parties involved in a Misconduct process must be respected. Information gathered is confidential and must be used only for purpose of the Misconduct process. In some instances, a breach of confidentiality is a criminal offence.

Respect

Senior staff need to ensure that interactions with employees, during any Misconduct process, are characterised by the normal standards of respect and civility.

Standard of proof

The standard of proof required to establish whether there has been misconduct, consistent with tribunal hearings of this nature, is generally determined on the balance of probabilities. This means that the investigating staff member needs to be convinced that it is more likely than not that the employee has committed misconduct. It also means that the higher standard of proof of "beyond all reasonable doubt" is not necessary. However, the standard of proof required should also be commensurate with the potential severity of the outcome. For instance, where a staff member is facing termination of their employment then a much higher standard of proof would be required.

Malicious and Vexatious Complainants

The University has developed protections to ensure appropriate action is taken in respect of any malicious or vexatious complaints it receives.

Timing

To the extent possible, all allegations of misconduct should be assessed, investigated, progressed and administered in a timely but cautious manner taking account of the rights of both the discloser and the officer who is the subject of the alleged misconduct/serious misconduct allegations.

Discovery

Before the University can take action on allegations of misconduct sufficient appropriate or evidence information must have been received or discovered by the University and assessed.

Such information may be sourced in a number of ways as follows:

Anonymous – an anonymous disclosure may be made. The University is committed to assessing/investigating and such disclosures.

External – a referral may come from an external agency, an external complainant, a student (external for the purposes of this process) or other (journalist, newspaper, contractor, ex member of staff).

External agencies include:

- CMC = Crime & Misconduct Commission
- QPS/CIB/AFP = Qld Police Service/Criminal investigation Branch/Aust Federal Police
- QAO = Queensland Audit Office
- QOO = Queensland Ombudsman's Office
- ADCQ = Anti-Discrimination Commission Queensland
- HREOC = Human Rights and Equal Opportunity Commission
- DEEWR

Internal – alleged misconduct may also be identified internally by Internal Audit during the course of internal audit activities (including activities identified by external audit), a Committee whilst dealing with matters within its remit, a Workplace Health and Safety Officer, or an officer of the University who is not a member of staff.

Whistleblower – a public interest disclosure (PID) may be made by a 'discloser' under the Public Interest Disclosure Act 2011. Such a discloser is automatically protected from reprisal action.

The way or form in which misconduct may be discovered by the University is varied but generally falls under one or more of the following types – direct allegation, complaint, tip-off and public interest disclosure. It may not always be clear, at first, the exact nature of the alleged misconduct and the precise manner in which the matter must be dealt with.

Where should the alleged misconduct be referred to once it has been discovered?

Any member of staff who is in possession of information that may be construed as misconduct has a number of options as to where to refer such information. It could be referred to any or all of the following members of staff:

- the staff member's supervisor
- the staff member's section head
- the staff member's head of School/Directorate
- the staff member's head of Faculty/Division
- the University Secretary
- the Director, Audit and Assurance
- the Director, Human Resource Management
- the Director, Equity careers and Counselling (Bullying and Harassment matters)
- the Vice-Chancellor
- the Chancellor

However, the three (3) primary points of contact for referral of allegations of misconduct are:-

- the University Secretary
- the Director, Audit and Assurance
- the Director, Human Resource Management

Action to be taken by officers in receipt of alleged misconduct

Each officer in receipt of information about alleged misconduct has a duty to act on such information. As a general rule the more serious the matter discovered the faster such information should be passed onto the appropriate officer for a preliminary assessment. In this regard the information should find its way into the hands of the University Secretary, the Director, Audit and Assurance or the Director, Human Resource Management. These officers are aware of the University's legislative, statutory and reporting obligations that may require the University to take specific action ahead of any internal assessment, review or investigation.

The range of matters or activities that could result in alleged misconduct is broad. Examples include, but are not limited to:

- Child Exploitation Material/Firearms/Drugs
- Fraud/corruption (the University has a zero tolerance approach to fraud and corruption – see *Statement on Integrity*)
- Criminal Offence
- Negligent or Improper Conduct
- Breach of Ethical Standards (Code of Conduct)
- Breach of Code for the Responsible Conduct of Research
- Research Misconduct
- Maladministration
- Danger to Health & Safety of a Person with a Disability
- Danger to the Environment
- Reprisal Action
- Discrimination

- Bullying & Harassment
- Misuse of Communication Facilities

Assessment

It is critically important that the exact nature of any alleged misconduct be accurately identified as the required action to be taken in relation to that conduct may be prescribed at law. This process may require a “case conference” between the University Secretary, the Director, Audit and Assurance and the Director, Human Resource Management.

Additionally, a preliminary assessment may be required. This preliminary examination can be undertaken by either officer or under their direction using external contracted resources. It is important to ensure that as much evidence as is available is obtained and incorporated into the preliminary assessment process and before a decision is made to proceed with an investigation of the allegations.

At this stage of the process formal allegations of misconduct are not usually notified to any member of staff or officer and any enquiries, assessment or investigation being undertaken is considered to be of a preliminary nature and members of staff who are questioned are merely assisting the investigating officer with their enquiries. In the event that formal allegations are eventually notified to a staff member such action would normally be undertaken in accordance with the Enterprise Agreement and procedural fairness would apply.

Despite having made a preliminary assessment, it may be necessary for the responsible officer to seek further information, supporting detail or evidence to assist that officer in finalising their preliminary assessment in order to allow them to make a determination as to whether the alleged misconduct should be investigated in the appropriate manner. Until the responsible officer has been able to finalise this assessment, the information or allegations maybe held pending the provision of the additional material. Notwithstanding this, the responsible officer is entitled to finalise their assessment at any point in time based on the information or material that has been provided to them, may decide to take no further action.

Having determined the nature of any alleged misconduct, the following action may be required to be taken ahead of any determination of action required under the EA or University Policy.

1. Should the University find itself in the possession of Child exploitation material, firearms or drugs then the University is required under sec 228D of the Criminal Code to immediately refer such material to the Criminal Investigation Branch of the Queensland Police Service. The CIB have advised that assessments of such material can be provided on request to enable the University to proceed with any internal misconduct process; however, the original physical evidence will not be accessible until the QPS has finished with it. The University may proceed with an internal process in consultation with the CIB. Maintaining possession of (or taking a copy of in the case of child exploitation material) any such material is, in itself, an offence under the Criminal Code.
2. Matters involving alleged Official Misconduct are required to be referred to the Crime and Misconduct Commission under the Crime and Misconduct Act. Failure to refer Official Misconduct to the CMC is an offence. The threshold set for referral of Official Misconduct is very low. Only a “mere suspicion” is required before a referral must be made. Once a matter has been referred to the CMC no action can be taken by the University until the CMC has determined whether it proposes to investigate the matter

directly, whether or not the University is requested to undertake the investigation on the CMC's behalf. Such determination is recorded in a CMC Assessment Report. Where the CMC investigates directly or monitors the University's investigation, the University must wait for an official report from the CMC, on the outcome of those investigations prior to taking any internal action.

3. Where a member of staff either seeks or is eligible for protection under the Protected Disclosures Act 2010 the University is required to take prescribed action in respect of that staff member including consultation with the staff member in relation to an investigation plan and the steps being taken by the University to ensure reprisal action is not taken against that staff member. A breach of confidentiality can constitute a criminal offence.
4. Where any complaint or allegations of Research Misconduct is received by the University, that involves specified personnel in receipt of NHMRC funding, then it is a requirement under the Funding Agreement with the University and the NHMRC that in all cases, the NHMRC must be notified within ten (10) working days following receipt of the complaint or allegation and must be notified within ten (10) working days of reaching a decision following an investigation or enquiry into the alleged research misconduct (Clause 16).

The responsible officer will need to consider whether a notification is required to the University's insurers where a potential liability/claim against the University may arise as a result of the alleged misconduct. The following responsible officers are likely to consider the following allegations of misconduct that relate to:

Area of Misconduct	Responsible Officer
Non-Financial Fraud & Corruption Legislative Breaches Contractual Breach Reprisal Action Threat to Public Health/Safety/Environment	Director, Governance Services and University Secretary
Financial Fraud & Corruption Other Financial Related Misconduct Misappropriation	Director, Audit & Assurance (will report directly to VC and Audit & Compliance Committee)
Employee Misconduct Issues Maladministration Breaches of Code of Conduct Other Misconduct / Serious Misconduct Danger to the Environment Bullying & Harassment Discrimination	Director, Human Resources Management
Danger to Health & Safety of a Person with a Disability	Director, Equity & Student Engagement
Misuse of Communication Facilities	Director, Information Technology &

	Resources
Research Misconduct	Senior Deputy Vice Chancellor

The first action to be taken by the responsible officer following receipt of an allegation / complaint / tip-off or PID is a Preliminary Assessment /Report. This is undertaken internally and may result in:

- alleged Official Misconduct
- alleged Serious Misconduct
- alleged Misconduct
- No Misconduct

As there are a number of possible outcomes and potential investigating officers it is likely the Preliminary Assessment / Investigation will be preceded by a Case Management Conference in order to allocate responsibility and tasks.

Official Misconduct

Official Misconduct involves wrongdoing by a public sector official in carrying out their official duties or exercising their powers. Anyone outside the public who tries to corrupt a public officer can also be guilty of official misconduct if the matter involves a criminal offence.

The following examples indicate the types of behaviour that could lead to a complaint of official misconduct.

Is the behaviour:

- that of a public official?
- related to the person's official duties or powers?
- at least one of the following
 - dishonest or lacking impartiality
 - a breach of trust
 - a misuse of officially obtained information?
- a criminal offence or serious enough to warrant dismissal?

If the answer to all questions is 'yes', the behaviour is likely to be official misconduct.

Examples:

- Accepting money or other benefits in exchange for helping someone to avoid prosecution, win a contract, or gain government approval
- Stealing an employer's property or cash
- Gaining a personal benefit by not revealing a conflict of interest
- Unlawfully assaulting a person

Official Misconduct will be referred to the Crime & Misconduct Commission by the University.

Serious Misconduct

Serious Misconduct is defined* as “serious misbehaviour of a kind which constitutes:

- Serious impediment to the carrying out of an employee’s duties or to the employee’s colleagues carrying out their duties;
- Serious dereliction of the duties required of the employee’s office; or
- Conviction by a court of an offence which constitutes a serious impediment of the kind referred to in the definition”.

Misconduct

Misconduct is defined* as “conduct which is not serious misconduct, but which is nonetheless conduct which is unsatisfactory”.

No Misconduct – no misconduct will result in no further action.

Disciplinary Action may result from misconduct or serious misconduct. Disciplinary action is action by the University to discipline an employee for unsatisfactory performance, misconduct or serious misconduct, and may include:

- Formal censure or counselling;
- Demotion by one or more classification levels or increments;
- Withholding of an increment;
- Suspension with or without pay;
- Termination of employment (unsatisfactory performance, serious misconduct).

The procedure for dealing with misconduct or serious misconduct is set out in the Misconduct and Serious Misconduct Policy (http://www.jcu.edu.au/policy/allitoz/JCUDEV_008587.html).

Duty of Care

Where health well being or safety of a staff member, officer, student or member of the public is under threat as a result of conduct of a staff member or officer of the University, provisions exist which permit action to be taken by the University to suspend that officer or staff member while the matter is being dealt with. While timing may be critical in such instances it may be equally important to establish a valid basis before action is taken. Under the Enterprise Agreement before staff member may be suspended, formal allegations must have been notified in writing to that staff member.

Potential Misconduct - Process

Preliminary examination

Where the University becomes aware of the possibility that an employee may have committed misconduct, the responsible manager should gather the available information. Where the manager considers it warranted specific issues may be investigated to add to the available information.

Where, as a result of considering the available information, the manager suspects that an employee may have committed misconduct or serious misconduct the matter should be referred to the relevant officer. A further preliminary assessment or preliminary investigation may be undertaken to determine whether the allegations warrant further investigation. As noted previously, if it is determined that the alleged conduct may constitute Official Misconduct the matter will need to be referred by the VC to the CMC. If the alleged conduct involves child exploitation firearms or drugs then it must be immediately referred to the CIB.

If an internal preliminary assessment or investigation conducted by internal audit or the University secretary or Director HRM determines misconduct/serious misconduct then the matter must be referred to the VC for action under the Enterprise Agreement. Relevant sections of the Enterprise Agreement have been attached to these Guidelines in attachment A.

Putting the information before the employee

An employee must be advised of the suspected misconduct/serious misconduct and be given an opportunity to put their side of things.

An employee must be given an opportunity to be heard with regard to the facts of the matter, and on the question of whether a conclusion of misconduct should be drawn from the facts. Where it is reasonable an employee can be given time to formulate their response.

Where an employee directs the manager to another source of information e.g. a fresh witness, the manager must gather the information from that source.

Considering the evidence and submissions

Having heard from the employee the relevant manager needs to consider all available information, including evidence or submissions from the employee. The manager needs to draw conclusions on:

1. Whether the facts of the matter can be established;
2. Whether the established facts support a conclusion of misconduct; and
3. If there has been misconduct how serious is it and what potential penalty could apply.

No conclusion of misconduct

Where the facts cannot be established, or where the established facts do not support a conclusion of misconduct the employee will be advised as soon as possible. If there is not a sufficient basis to establish misconduct the employee is entitled to the presumption that no misconduct occurred but a notification of total exoneration will not be provided.

In some cases where misconduct is not established the mere possibility of certain facts being true may require some precautionary action from the University. This will be particularly so where a duty of care is owed to students, other staff or the public.

Conclusion of misconduct

Where the established facts support a conclusion of misconduct the employee will be advised of this finding as well as the manager's preliminary view on the seriousness of the misconduct and the appropriate penalty.

Opportunity to be heard on seriousness and penalty

The employee is usually provided with an opportunity to make submissions on the seriousness of the misconduct and the question of penalty. The employee would normally be invited to explain any mitigating factors they want considered.

Disciplinary Action

Where misconduct/serious misconduct has been established the available sanctions are:

- Formal censure or counselling;
- Demotion by one or more classification levels or increments;
- Withholding of an increment;
- Suspension with or without pay;
- Termination of employment (unsatisfactory performance, serious misconduct).

The choice of action depends on the seriousness of the matter, the extent of any mitigation, and consideration of the employee's previous conduct. Where it is concluded that termination of employment is appropriate this will proceed in accordance with the employee's Workplace Agreement or Contract of Employment.

Any action to issue a formal warning or to terminate an employee's employment must be referred to the Director of Human Resources. Where it is concluded that termination of employment is appropriate this will proceed in accordance with the employee's Workplace Agreement or Contract of Employment.

Reporting and Accountability Obligations

The University is required to meet certain reporting and accountability obligations including:

- Obligations to advise disclosers of the outcomes of investigation of their disclosures
- Obligations to advise the Public Service Commission of any Public Interest Disclosures and outcomes

- Obligations to report back to external agencies on matters referred to the University (eg CMC)
- reports to various committees of Council including Audit and Compliance (audit reports on investigation of fraud and corruption) and Remuneration and HR (reports by the Director HRM on staff misconduct matters) Committees
- Obligations to report to external bodies (for eg NHMRC) in accordance with funding agreements on any reportable matters (eg Research Misconduct is reportable to the NHMRC in relation to allegations of misconduct relating to NHMRC funding)

Obligations under Financial and Performance Management Standard 2009, section 21

Section 21 - Loss from offence or misconduct

- (1)
- (2)
- (3) If the loss is a material loss, the accountable officer or statutory body must, as soon as practicable but not later than 6 months after the accountable officer or statutory body becomes aware of the loss, notify—
 - (a) the appropriate Minister for the department or statutory body; and
 - (b) the auditor-general; and
 - (c) for a loss mentioned in subsection (1)(b)(i)—a police officer; and
 - (d) for a loss mentioned in subsection (1)(b)(ii)—the Crime and Misconduct Commission.

material loss, for property of a department or statutory body, means—

- (a) for property that is money—a loss of more than \$500; or
- (b) for other property—a loss valued by the accountable officer of the department or the statutory body at more than \$5000.

Relevant Sections of the JCU Enterprise Agreement

29. Misconduct or Serious Misconduct

29.1 Application

Where the University believes that disciplinary action is required for misconduct or serious misconduct, the University will act through this clause. Where a matter which may involve misconduct or serious misconduct has been dealt with in good faith as a case of unsatisfactory performance, pursuant to the provisions of clause 28, *Unsatisfactory Performance*, the procedures of this clause are not required.

29.2 Statement of Allegations

Any allegation of misconduct or serious misconduct will be considered by the Vice-Chancellor. If the Vice-Chancellor believes such allegations warrant further investigation, the Vice-Chancellor will notify the employee in writing and in sufficient detail to enable the employee to understand the precise nature of the allegations, and to properly consider and respond to them. The notification will require the employee to submit a written response within 10 working days.

29.3 Suspension

At the time of notifying the employee of the allegations the Vice-Chancellor may suspend the employee on full pay, or may suspend the employee without pay if the Vice-Chancellor is of the view that the alleged conduct amounts to serious misconduct of a kind and type that, except for the existence of this clause, it would be unreasonable to require the University to continue employment during a period of notice.

Where suspension without pay occurs at a time when the employee is on paid leave of absence, the employee will continue to receive a salary for the period of leave of absence. The employee may engage in external paid employment or draw on any recreation leave or eligible long service leave credits during the suspension without pay. Further the Vice-Chancellor may direct that salary be paid on the grounds of hardship.

Where a suspension without pay has been imposed and the matter is subsequently referred to a Review Committee, at its first meeting the Committee shall make a recommendation to the Vice-Chancellor whether or not suspension without pay should be revoked from the date of effect, or continue. The Vice-Chancellor shall consider and act on the recommendation as a matter of urgency.

During any period of suspension the employee may be excluded from the University, provided that the employee will be permitted reasonable access to the University for the preparation of the employee's case and to collect personal property. If the original allegations of misconduct or serious misconduct are not upheld, any lost income because of suspension will be reimbursed.

29.4 Employee's Response

If the allegations are admitted in full by the employee, and the Vice-Chancellor is of the view that the conduct amounts to misconduct or serious misconduct, the Vice-Chancellor will advise the employee, in writing, of the Vice-Chancellor's decision and the operative date of the disciplinary action.

If the allegations are denied by the employee, and the Vice-Chancellor is of the view that there has been no misconduct or serious misconduct, the Vice-Chancellor will advise the employee,

in writing, and may, by agreement with the employee, publish the advice in an appropriate manner. If the allegation is denied in part or in full, or if the employee has not responded to the allegations, the Vice-Chancellor will refer the matter to a Review Committee, clause 57, unless the Vice-Chancellor decides to take no further action or counsel or censure the employee for unsatisfactory behaviour and take no other action.

29.4 Action by the Vice-Chancellor

On receipt of the report of the Review Committee, and having considered its findings related to the alleged misconduct or serious misconduct, and any recommendation on disciplinary action, the Vice-Chancellor may take disciplinary action.

If, the Vice-Chancellor is of the view that there has been no misconduct or serious misconduct the Vice-Chancellor will immediately advise the employee in writing. The Vice Chancellor may, by agreement with the employee, publish the advice in an appropriate manner.

Where an employee has been suspended without pay pending the decision of the Vice-Chancellor, any lost income will be reimbursed if there was no misconduct or serious misconduct. However, a decision taken by the Vice-Chancellor, at the Vice-Chancellor's discretion, not to dismiss or impose another penalty, will not be construed as an admission that there was no conduct justifying suspension without pay.

This Agreement in no way constrains the University from carrying out other or further investigations relating to the consequences of conduct of an employee or former employee, when required in the public interest, as for example, inquiring into the validity of research results.

All actions of the Vice-Chancellor under this clause will be final, except that nothing in this clause will be construed as excluding the jurisdiction of any external court or tribunal which, but for this clause, would be competent to deal with the matter.