



## NSW Legislative Council Hansard

### Education Legislation Amendment (Staff) Bill

Extract from NSW Legislative Council Hansard and Papers Wednesday 10 May 2006.

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#### Second Reading

**The Hon. ERIC ROOZENDAAL** (Minister for Roads) [4.53 p.m.], on behalf of the Hon. John Hatzistergos: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

#### Leave granted.

The lemma Government is committed to ensuring that the New South Wales education system continues to meet the challenges of the twenty-first century and is delivering world-class results.

The Department of Education and Training and TAFE provide schooling and vocational education to over a million students in NSW.

And as we all know, as parents, as citizens, as teachers and as a Parliament, a quality education gives young Australians the best possible start to life and work.

Research demonstrates the critical role of quality teachers in education outcomes.

The NSW Government is;

- spending \$10.2 billion on education and training,
- supporting quality teaching through the creation of the Institute of Teachers,
- spending \$650 million over 4 years on class size reduction and
- investing \$144 million over four years in teacher professional development.

As the major NSW Government agencies entrusted with the provision of school and vocational education to over a million students, the Department and TAFE have a responsibility to appropriately deal with the small number of teachers and other employees whose work performance and conduct is of an unsatisfactory standard.

And I stress a small number.

The overwhelming majority of teachers and other staff working in Government schools and TAFE are doing a fine job—they are dedicated and committed—and will not be affected by the proposed changes.

Accordingly, the Government will amend the *Teaching Services Act 1980*, 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 the conduct and performance of persons employed under the Acts and to dismiss and otherwise deal with employees who become prohibited persons.

The bill will:

- Provide a faster and less complex process for dealing with poor performance and misconduct;
- Ensure the immediate and automatic dismissal of teachers or other employees convicted of sex offences;
- Provide better monitoring of teachers and support staff who will have their work regularly reviewed; and
- Ensure the rights of children are given paramount importance by departmental decision-makers, courts and tribunals when any action is taken against departmental employees.

#### New Disciplinary Procedures

The new streamlined disciplinary processes that the Government is introducing reflect those already applying to the bulk of public servants, including those employed under the *Public Sector Employment and Management Act 2002*.

Just as the disciplinary provisions of the *Public Sector Employment and Management Act 2002* apply only to permanent staff and not to temporary staff, so too, the provisions of the new legislation apply only to permanent

staff of the department and TAFE.

The general principle is that it is only permanent staff for whom formal disciplinary action is necessary, as temporary staff have no on-going tenure.

Temporary staff are afforded separate procedurally fair processes for dealing with conduct and performance issues.

In order to clarify the expectations for all concerned, the objectives of disciplinary action are to be introduced into legislation.

These objectives are:

- to maintain appropriate standards of conduct and work-related performance for permanent employees,
- to protect and enhance the integrity and reputation of the department or TAFE, and
- to ensure that the public interest is protected.

Underpinning these objectives will be discipline procedures which cut red tape while continuing to ensure that employees receive procedural fairness, in circumstances other than convictions for serious sex offences.

Under the previous discipline systems a "mini trial" was held before a departmental official, known as a prescribed officer, during which witnesses, including children, could be cross-examined by barristers or even the employee themselves.

Child witnesses were guaranteed none of the protections provided to them during criminal trials when being a witness at one of these "mini-trials".

In the case of performance matters, this "mini-trial" occurred after a Teacher Improvement Program had been in place where the school principal worked closely with the teacher, identifying areas of weakness and setting the standards of performance required.

If the principal considered the teacher was not able to achieve the standard required, then it was referred after an independent procedural review, to the prescribed officer for the teacher to face a "charge" of inefficiency. The matters, including the principal's concerns about the teacher's performance were then dealt with all over again.

In the case of conduct matters, the "mini-trial" occurred after an exhaustive investigation had already been conducted into the allegations, including interviewing and taking of statements from witnesses.

If at the conclusion of the investigation, it was considered that misconduct had occurred, then the matter was referred to the prescribed officer to oversee the "mini-trial".

All the issues that had already been the subject of the original investigation are dealt with all over again.

The outcome was a protracted, bureaucratic and legalistic disciplinary process which often got bogged down in the technical legal aspects of matters rather than focusing on the substantive merits of the case. This process had a detrimental impact on children and other witnesses, the workplace and the employee that was being dealt with.

It was not unusual for disciplinary matters surrounding teacher performance to take up to 15 months from beginning to end, or for teacher conduct matters to take up to 2 years.

The "mini-trial" is abolished as part of the Government's reforms and replaced with new streamlined system based on that introduced for public servants under the Public Sector Employment and Management Act 2002.

The bill customises that system to take account of special responsibilities placed on teachers and support staff who work in schools.

As occurred with the Public Sector Employment and Management Act, detailed procedures for the new streamlined disciplinary systems will be contained in guidelines.

The bill provides that the guidelines will be drafted to provide procedural fairness to employees.

The bill simplifies the current arrangement in which there are twelve different categories of breaches of discipline by introducing a general category of disciplinary action called "misconduct". This avoids technical arguments about whether the issues in question have been properly characterised as fitting within one of the specific categories.

The bill also ensures remedial action can be taken as an alternative to disciplinary action. Remedial action includes formal and informal counselling, staff development and training.

This acknowledges that a punitive approach is not always the best way to ensure improved performance in future from an employee whose conduct was not as serious as to warrant dismissal.

So, for example, if a teacher displayed some form of immature behaviour of a less serious kind, the current system allows the penalties of warning, reprimand, fine or demotion.

Under the system introduced by the bill, informal counselling and skill development would be possible. That is not to say that the counselling and skill development are always appropriate—but this bill gives the Department a greater range of options in managing employees.

The current disciplinary system treats unsatisfactory performance in the same way as a misconduct matter. This bill separates the two and ensures that staff performance is reviewed on a periodic basis as determined by the Director-General of the Department or the Managing Director of TAFE.

Undertaking periodic reviews of performance is consistent with existing practice, but the bill will provide a legislative underpinning.

There is already a requirement of an annual review of the performance of school teachers under the Teacher Assessment Review Schedule (TARS). The annual review requirement already exists for school principals.

An employee whose performance is of concern will be informed of those concerns and will be required to undertake a performance improvement program designed to meet the identified concerns. If at the end of the program the employee's performance is still not satisfactory, the Director-General or the Managing Director will be empowered to take appropriate action, including dismissal or demotion.

Staff will maintain their existing right of appeal to either the Industrial Relations Commission or the Government and Related Employees Tribunal against disciplinary action taken against them.

Existing powers to suspend staff have been strengthened. The Acts will expressly provide that the Director-General and Managing Director be able to suspend, or continue a suspension of, an employee charged with a serious criminal offence until a decision is made about what, if any, disciplinary action should be taken against the employee.

It is important to be clear that this circumstance is different to that applying where a person has been convicted of a serious sexual offence or other relevant serious offence.

As I will detail shortly, when they are convicted they will not longer be employed. When they are merely charged, however, the Act currently allows a suspension from duty, with or without pay.

It is important to understand that there will be some occasions where despite a criminal charge being dismissed, there may be reasons to continue a suspension until departmental disciplinary procedures are finalised.

Acquittals may occur for a range of reasons—often reasons related to the protections surrounding criminal trials. However, the Department has different considerations when deciding whether a person is suitable to be employed with children.

It may be that different evidence is available, that charges can be proven to a different standard of proof; or that admissions made or evidence heard during a criminal trial which, though may not lead to a conviction in relation to the criminal offence, raise concerns as to fitness to teach. In such cases it is important that there is a power to continue the suspension.

The Acts will now also provide that the salary of such employees may, at the discretion of the Director-General and Managing Director, be withheld from an employee who is suspended and who is found guilty of an offence but no conviction is recorded against him or her.

### **Sex Offences**

As agencies responsible for the care and welfare of students the Department of Education and Training and TAFE have an obligation to protect the children and young people in their care from sexual, physical and emotional abuse and neglect and from other inappropriate conduct.

The Government has already introduced a comprehensive legislative scheme which deals with an evaluation of the fitness of people who work, or seek to work, in child-related employment and are convicted of a serious sex offence or otherwise become a prohibited person.

This bill builds upon this legislative scheme by recognising the special trust placed by the community in school teachers and others working in schools, and in TAFE teachers who work with children or young people. This bill recognises that confidence in public education is eroded when a staff member who works with children is convicted of a serious sex offence.

Criminal trials have a range of special safeguards to ensure the unjustly accused are not convicted. These include:

- The presumption of innocence
- the requirement for the prosecution to prove the case beyond reasonable doubt, not just on the balance of probabilities
- where the offence is an indictable one, the verdict being decided by a jury of one's peers
- the right to legal representation
- the right of an accused person to silence
- the scrupulous adherence to the rules of evidence

Under this bill such educational professionals who work with children and who are convicted of a serious sex offence or otherwise become a prohibited person will be dismissed from employment effective from the date of their conviction. That is, where such a person is convicted of a crime by a criminal court, there is no place for them in public education.

The dismissal will occur as a direct consequence of the criminal conviction, not as a result of departmental disciplinary action.

### **Appeals**

Any person dismissed as a consequence of such a conviction has the right to appeal. If their conviction is overturned they will be entitled to automatic reinstatement or re-employment to a similar position.

If they subsequently receive an order from a court or relevant tribunal that their conviction no longer makes them a prohibited person for the purposes of the Act, then they will be automatically reinstated provided they have obtained the clearance within 12 months of their employment being terminated.

### **Paramount Consideration**

For the first time express provision is made in these Acts for paramount consideration to be given to the importance of protecting children when dealing with staff disciplinary matters. Departmental decision makers will need to give paramount consideration to the need to protect children when deciding how to deal with teachers and other staff who are subject to disciplinary action for misconduct or unsatisfactory performance.

Courts reviewing disciplinary outcomes for TAFE teachers, school teachers and other people who work in schools will also be required to give paramount consideration to the need to protect children when dealing with an appeal or other court action taken by an employee against any decision made by the department or TAFE in the disciplinary context.

In conclusion, the Government is committed to ensuring that the community receive quality services from government education providers and that students will be able to learn in a safe environment. The changes introduced by the bill will assist the Government to achieve these outcomes.

These reforms are commonsense, practical improvements that will strengthen the public education system in New South Wales.

I commend the bill to the House.