



# Dealing with Allegations of Misconduct Procedures – Volunteer members

Version 1.0  
5 December 2016

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## 1 Purpose, scope and application

The New South Wales State Emergency Service (NSW SES) has issued this procedure for the purposes of:

- (a) dealing with allegations of misconduct made against volunteer members, and
- (b) the taking of disciplinary action with respect to volunteer members.

**Compliance is mandatory.**

## 2 Definitions

Term	Definition
<b>Commissioner</b>	Commissioner of the NSW State Emergency Service
<b>Disciplinary Action</b>	Volunteer members: <ul style="list-style-type: none"> <li>(a) Withdrawal of membership</li> <li>(b) Revocation of appointment as Controller, Deputy Controller (Local or Unit) or Team Leader</li> <li>(c) Caution or reprimand</li> <li>(d) Monitoring the member's conduct or performance</li> </ul>
<b>Documentation</b>	In relation to agreed goals, targets and tasks means all relevant written documentation including work plans; role descriptions or duty statements and any other documentation.
<b>Employees</b>	Any person employed directly by the NSW SES in an ongoing, part-time, temporary or casual capacity.
<b>Misconduct</b>	NSW SES considers misconduct to include: <ul style="list-style-type: none"> <li>• Performance of duties in a manner which contravenes the provisions of NSW SES policies and procedures, in particular the NSW SES Code of Conduct and Ethics and Statement of Values – TARPS</li> <li>• Safety breaches</li> <li>• Taking detrimental action against a person that is substantially a reprisal for the person making a public interest disclosure within the meaning of the <i>Public Interest Disclosure Act 1994 (NSW)</i></li> <li>• Taking any action against another person that is substantially in reprisal for an internal disclosure, complaint or grievance by that person</li> </ul>

Term	Definition
<b>Procedural Fairness</b>	Involves decision-makers informing members of the case against them or their interests, giving them a right to respond, not having a personal interest in the outcome and acting on the basis of logically probative evidence.
<b>Public Interest Disclosure</b>	A report about alleged wrong doing made by a public official in New South Wales that meets the requirements of the <i>Public Interest Disclosure Act 1994 (NSW)</i>
<b>Remedial Action</b>	Means any one or more of the following: (a) counselling (b) training and development (c) the issuing of a warning to the member that certain conduct is unacceptable or that the member's performance is not satisfactory (d) transferring the member to another Unit/location
<b>Serious Offences</b>	Means an offence punishable by 12 months imprisonment or more. A serious offence is an offence punishable by imprisonment for 12 months or more (including an offence committed outside NSW that would be an offence so punishable if committed in NSW). The prison term refers to the period that the offence may carry not the actual prison term that is imposed.
<b>Supervisor</b>	The person identified as the leader or member in charge of the activity or location. In the case of reporting suspected or known deviation of this policy, a member with the appointment of Unit Controller or above is desirable.

## 3 Procedures for dealing with allegations of misconduct

### 3.1 Purpose

These procedures are issued for the purpose of dealing with allegations of misconduct as a disciplinary matter and the taking of disciplinary action against a volunteer member for misconduct.

The procedures also set out the process related to taking remedial action instead of disciplinary action where appropriate and reasonable to do so.

### 3.2 Application and effect

The procedures apply to volunteer members of the NSW SES, including those on probation.

If a decision is made to deal with an allegation of misconduct as a disciplinary matter, it must be dealt with in accordance with these procedures. These procedures in relation to misconduct **are mandatory**.

The Procedures must be applied following the correct application of the policies below and, where relevant, in accordance with:

- *NSW SES Code of Conduct and Ethics Policy*
- *NSW SES Bullying and Harassment Policy*
- *NSW SES Public Interest Disclosure Policy*

If there is any inconsistency between these procedures and any previous policies or guidelines, subject to any statutory requirement, these procedures shall prevail.

It should be noted that these procedures **do not** apply to NSW SES employees appointed under the provisions of the *Government Sector Employment Act 2013 (the GSE Act)*. Allegations of misconduct relating to employees appointed under provisions of *the GSE Act* are dealt with and managed in accordance with the provisions of that Act and related *Government Sector Employment Rules 2014*.

### 3.3 Delegation – The Commissioner

The Commissioner is required to deal with alleged misconduct by a member.

The Commissioner may delegate any of his/her functions relating to the management of misconduct allegations, other than the power of delegation to a member of staff of the NSW SES.

Generally, if the functions are delegated by a Commissioner, the functions would be delegated to a NSW SES member who understands the disciplinary process and who has available to him/her the resources necessary to perform the delegated function.

In delegating the authority to deal with a disciplinary matter, the entire function including the tasks of determining whether the member has engaged in misconduct and that of imposing the relevant disciplinary action or otherwise, should be delegated to the same person.

### 3.4 Timeframes

The requirements of these procedures as to the disciplinary process are to be complied in a timely and expeditious manner.

In some cases where other agencies are involved, internal investigations and disciplinary processes may be delayed. For example, reasonable delays may occur where another external body, such as the NSW Police Force, NSW Ombudsman or Independent Commission Against Corruption (ICAC) has requested that NSW SES processes be deferred while it carries out an investigation.

Other matters that may impact upon timeliness include:

- Complexity of the issues

- Number of witnesses involved
- Need to seek external or internal expert advice
- Impact of the delay on the fairness of the process or matters arising from the process, such as the suspension of the member
- Health or well-being of the member

As a guide only, uncomplicated matters should generally be concluded after 10-12 weeks from when the Commissioner receives the initial allegation.

Irrespective of the complexity of the matter, after 12 weeks from the receipt of the allegation, the Commissioner is to advise the member the subject of the allegation/s in writing, of the anticipated time for the current stage (there are four stages as listed below) to conclude and outline the reasons for any delays to date or anticipated delays. Reasons for a delay may include complexity of the matter, exceptional circumstances, and a request for delay by an external investigating authority, or availability of the member. Similar advice is to be sent each subsequent six weeks after the first advice.

### **3.5 Misconduct**

Misconduct may relate to an incident or conduct that happened while the volunteer member was not on duty or before the member was appointed to his or her position.

In determining whether such conduct should be dealt with as a disciplinary matter the Commissioner should have regard:

- to maintain appropriate standards of conduct and work-related performance at the NSW SES
- to protect and enhance the integrity and reputation of the NSW SES, and
- ensure the public interest is protected.

The Commissioner should consider:

- whether there is a relevant connection between the conduct and the member's position and duties
- the context of the incident
- the age of the incident or offence
- whether the incident was considered fundamental to the decision to recruit /promote the member
- the member's record and history
- whether remedial action is more appropriate, and
- whether there are other options which might be applied such as referral to member assistance providers, alcohol and drug rehabilitation and anger management counselling.

### ***Public Interest Disclosure***

A **Public Interest Disclosure** is a disclosure made within the meaning of the *Public Interest Disclosures Act 1994*.

The object of the *Public Interest Disclosures Act 1994* is to encourage and facilitate a disclosure, made in the public interest, of corrupt conduct, maladministration and serious and substantial waste in the public sector. It is a criminal offence to take 'detrimental action' against another person that is substantially in reprisal for the other person making a protected disclosure. An offence against the *Public Interest Disclosures Act 1994* constitutes misconduct.

**Detrimental action** means action causing, comprising or involving any of the following:

- injury, damage or loss;
- intimidation or harassment;
- discrimination, disadvantage or adverse treatment in relation to membership;
- dismissal from, or prejudice in, membership; and
- disciplinary proceedings.

It is important to understand that the onus of proof in relation to any proceedings for an offence requires the defendant to prove that detrimental action taken against a person was not substantially in reprisal for the person making a public interest disclosure. This is a reversal of the usual standard, which requires the prosecution to prove the case.

### ***Misconduct – member resigns prior to action being taken***

Disciplinary action arising from misconduct can still be taken, even though the member has resigned from their volunteer position prior to the action being taken.

Whether to pursue action after a member has resigned depends on a number of factors such as:

- the seriousness of the allegation or incident

- the practicality of access to the former member, and/or
- the cost/benefit to the Department of pursuing the matter.

### ***Internal Disclosure***

An internal disclosure means a disclosure made by a member regarding an alleged breach of misconduct by another member where both members belong to the NSW SES. It is a specific ground of misconduct for anyone to take any action against another member that is substantially in reprisal for that member making an internal disclosure.

## **3.6 Procedural Fairness**

These procedures are subject to the rules of procedural fairness. Throughout the disciplinary process, the principles of procedural fairness must be followed.

The member must be advised in writing of the alleged misconduct. This requires specific details to be put to the member. The member must also be advised that the allegation, if treated as a disciplinary matter may, if proven, result in disciplinary action with a range of penalty options from a caution or reprimand to withdrawal of membership.

The member must have the opportunity to respond to the allegation.

A member found to have engaged in misconduct shall be given a separate opportunity to make representations in relation to any proposed disciplinary action to be taken.

All steps in the process are to be completed in a timely and expeditious fashion.

## **3.7 External notification requirements**

The Commissioner is to notify specified external agencies and Departments of allegations made, and disciplinary processes taken, in relation to certain behaviour, incidents and conduct.

In general, external notification needs to be made when any action is taken to investigate matters that have been the subject of allegations involving any of the following matters:

- child abuse
- sexual misconduct which involves children, is directed at children, or takes place in the presence of children
- acts of violence committed by the member in the course of membership which involves children, is directed at children, or takes place in the presence of children
- certain criminal offences, including theft and fraud, and/or
- corrupt conduct.



### 3.8 Stages in the process

The process may comprise of four stages:

- (i) Initial determination of an appropriate course of action regarding an allegation of misconduct;
- (ii) Investigation;
- (iii) Initial decision; and
- (iv) Implementation of final decision.

### 3.9 Initial determination of an appropriate course of action regarding an allegation of misconduct

All allegations of misconduct including theft, fraud or other possible corrupt conduct, assault, bullying and harassment (including sexual harassment) must be immediately notified to the Professional Standards Unit (Tel: 4251 6661 or via email: [complaints@ses.nsw.gov.au](mailto:complaints@ses.nsw.gov.au)), The Manager, Professional Standards will determine the appropriate process for dealing with the allegations.

When an allegation of possible misconduct is reported to the Professional Standards Unit, the Manager Professional Standards, in consultation with the Director of the Region/Unit to which the allegation relates, may decide:

- to deal with the allegations as a disciplinary matter and arrange for an investigation to be carried out, in which case these procedures must be followed
- it is appropriate to take remedial action
- to refer the matter back to the Region or Unit to be addressed by way of remedial or local management action
- to take no further action in relation to the allegation or incident
- to dismiss the allegation, or
- to both dismiss the allegation and decide to take no further action against the individual but take general management action.

Despite a decision being made to deal with an allegation of misconduct as a disciplinary matter, at any stage of the process a decision may be made:

- to take remedial action
- to dismiss the allegation, and/or
- that no further action is to be taken in relation to the matter.

Notwithstanding the initial decision to take remedial action, if it appears that the member engaged in other additional misconduct during that period, the Commissioner may deal with the alleged misconduct as a disciplinary matter.

In deciding what action to take upon receiving an allegation, the Manager Professional Standards should assess the matter and consider the facts, seriousness and nature of the particular incident. This may be able to be done solely

on the available paperwork. This is not to become the main investigation and, if undertaken, should be limited to obtaining sufficient information to allow the Manager Professional Standards to determine what course of action to take. It is not mandatory to have a preliminary investigation.

If at this stage, it is decided to take remedial action, the member may elect to place his or her comments in relation to the facts and/or the remedial action on their personnel/service file. Where the proposed remedial action is the transfer to another Unit/location then the member must be given an opportunity to make a submission with respect to such proposed remedial action before it is implemented. The Director implementing the remedial action in this case should be satisfied the member has no valid reason for refusing the transfer.

If the member the subject of the allegation is to be interviewed, the member is to be advised that the allegation if treated as a disciplinary matter may, if proven, result in disciplinary action with the severest penalty being withdrawal of membership. The member is also to be advised anything said by them at the interview may be taken into consideration if the matter is subject to a formal investigation, and also by the Decision Maker if required to decide if the member has engaged in misconduct.

Consideration should be given to matters such as:

- whether it is an isolated incident;
- the seriousness of the incident;
- the circumstances surrounding the incident;
- the membership history of the member;
- the status of and position held by the member;
- the reputation of the Department and the public sector; and
- the impact on the organisation and other members.

The member should be advised if it is decided to take remedial action in relation to the matter.

### **3.10 Investigation stage**

If a determination is made that an allegation of possible misconduct requires an investigation, The Manager Professional Standards will consult with the Director of the Region or Unit to which the allegation relates to identify a suitably experienced and qualified person to investigate and prepare an investigation report in relation to the allegations. The Director concerned will formally engage/appoint the person identified to undertake these investigations.

The conduct of an investigation will vary depending upon the particular case and its circumstances and the complexity or otherwise of the issues, incidents and facts of the matter. This step, like all in the process, should be completed in a timely and expeditious fashion.

Any delays in the process should be appropriately recorded and monitored.

Where, a Departmental investigation needs to be deferred as the result of an investigation by external authorities (such as the ICAC, NSW Ombudsman, or the NSW Police Force), the member may continue to remain on duty, be moved to another Unit/location or suspended. The action taken, if any, will depend upon the particular circumstances.

All stages of dealing with the allegation as a disciplinary matter should continue unless requested by the external authority to not proceed. If all stages are not completed and the member is charged criminally it is usually appropriate to await the outcome of the court proceedings.

This stage enables the issues to be fully explored before any final decision is made in relation to the allegation/s. It also includes continuation of an internal investigation where external authorities have completed any relevant investigation.

An investigation of the allegation shall not involve the following:

- a formal hearing, involving legal representation of the parties; and
- calling witnesses for examination or cross-examination.

Any investigation conducted into alleged misconduct shall, where relevant, include:

- a review of documentary material;
- inspection of the workplace or site of incident;
- interviewing all relevant persons, including the member, connected with the allegation or incident; and
- taking statements from the member or other relevant people.

### ***Alternative Unit/location or suspension of NSW SES membership***

Decisions in relation to this issue are to be based on the facts, nature and seriousness of the matter in the context of the member's position. The first consideration should be, is it appropriate for the member to continue in their usual duties. If the decision is that it is inappropriate, the first option is to relocate the member to alternative duties or duties at another Unit/location.

A member can be suspended from duty if:

- (i) an allegation that a member has engaged in misconduct is being dealt with as a disciplinary matter; or
- (ii) a member is charged with having committed a serious offence.

Suspension is not one of the penalty options available as a disciplinary action where the Commissioner or delegated officer is of the opinion the member has engaged in misconduct. It is a protective measure whilst the disciplinary process is being undertaken.

All decisions in relation to suspension should be reviewed at least every 30 days.

### ***Persons conducting the investigation***

The investigation shall be conducted by persons who:

- understand the investigation process
- have no direct involvement with the matter subject to investigation – that is, are free from actual or perceived bias
- are not or perceived to be biased because of some personal interest in the matter by reason of personal involvement or friendship with the member
- are objective and do not prejudge the matter, and
- are suitably experienced and qualified.

The Commissioner or his/her delegate should not have any role in the disciplinary process including the conduct of investigation if they are the source of the initial allegation against the member.

The person who is the source of the allegation should not have any involvement in the disciplinary process as either an investigator or as exercising the functions of the Commissioner.

### ***Absence of member does not preclude investigation***

The investigation may only be conducted in the absence of the member if:

- the member fails to attend an interview or provide a response to the allegation/s when afforded an opportunity to do so; and
- there are no reasonable circumstances mitigating the failure of the member to attend an interview or provide a response to the allegation/s.

### ***Non-disclosure***

Confidential information obtained during the investigation shall not be disclosed except for the purpose of the investigation or any action arising from the investigation, or for the purpose of obtaining advice from the NSW SES Volunteers Association/or a legal representative. This is to protect the integrity of the process and the privacy rights of the persons concerned.

Similarly, all witnesses, including the member the subject of the investigation and his/her representative, should be advised that they should not discuss the matter with any person other than the investigator or their legal representative or the NSW SES Volunteers Association.

If a witness informs the investigator at any time that he or she is being victimised or harassed by the member who is the subject of the investigation, the investigator is to refer them to the Manager Professional Standards so that the matter can be properly reported in writing.

### ***Advising member allegation being dealt with as a disciplinary matter***

Generally, once the decision has been made that the alleged misconduct is to be dealt with as a disciplinary matter, the member will be advised, in writing, of the allegation/s (details as known at that point in time subject to concerns as outlined below) as soon as practicable, having regard to the nature and circumstances of the matter. Such advice should generally be done within a few days of an investigator being appointed.

It is to be made very clear to the member the allegation/s are being treated as a disciplinary matter that may result in disciplinary action being taken with the severest penalty being withdrawal of membership.

If there is sufficient information to hand at this stage of the process and if full details and particulars of the allegations are known, this letter to the respondent member may also be used to afford them an opportunity to respond to the allegation/s. Depending upon the nature of that initial response, for example, if the respondent member were to admit the allegations were true and correct, there may be no need to undertake any further investigation in relation to the matter.

However, where there are reasonable concerns that the nature of the allegation or circumstances surrounding the matter may lead to the destruction of evidence, harassment or victimisation of suspected complainants it may be appropriate that details of the allegation/s or notification of pending investigation are not provided in the first instance.

### ***Conduct of interviews for the purpose of preparing an investigation report***

Interviews are an essential part of preparing an Investigation Report.

The following publications are of assistance to persons undertaking internal investigations and are particularly helpful in relation to collecting material and conducting interviews:

- Fact Finder guide to conducting Internal Investigations – an ICAC publication available on ICAC website at [www.icac.nsw.gov.au](http://www.icac.nsw.gov.au); and
- Investigation of Complaints – a publication of the NSW Ombudsman.

### ***Member the subject of allegation***

Prior to the allegations being formally put to the member under investigation, an interview may be conducted with the member against whom there is a possibility of disciplinary action being taken. The member is also to be advised that the allegation if proven, may result in disciplinary action with the severest penalty being withdrawal of membership. It is at the discretion of the investigator whether such interviews are necessary.

### ***Other interviews***

Other people may also have to be interviewed as part of the investigation process. A person who has merely been a witness to part or all of an alleged misconduct (and not a participant) may need to be interviewed as part of the investigation process. The persons should be advised that the information and any statements they provide may be disclosed to the person the subject of the investigation. The interview may be sound recorded with the knowledge of the interviewee.

### ***Opportunity to respond to the allegations***

During the Investigation Stage the member is to be given an opportunity to respond to the allegations.

This can be done either by way of a formal allegation letter or face-to-face interview. The formal allegation letter is forwarded by the investigator to the respondent member and will set out the details and particulars of the allegation/s, afford the respondent member an opportunity to respond to the allegation/s and explain that any response provided will be considered in determining whether or not allegations have been sustained.

The letter should also include advice to the member:

- that following the completion of the investigation that an Investigation Report will be provided to the Decision Maker;
- that in the case they do not provide a response to the allegation/s the Investigation Report will be completed based upon the information obtained from other sources and presently to hand;
- a decision will be made by the Decision Maker based on the facts and available information contained in the Investigation Report;
- that the member will be notified in writing of the outcome and where misconduct is established, the proposed action to be taken; and
- that he/she will be given an opportunity to make submissions to the Commissioner/Decision Maker in relation to any proposed disciplinary action before it is implemented – the submission may also include comments on the Investigation Report and if applicable on the opinion of the Decision Maker that the member has engaged in misconduct. Also if the proposed disciplinary action under consideration is withdrawal of membership, the member will be advised of their rights of appeal as set out within the NSW SES Volunteer Membership Policy.

This can be satisfied by sending a copy of these procedures to the member with the allegation letter.

In the case of a face-to-face interview, the member is provided with a letter from the investigating member detailing the nature of the allegations and advising the time and place of the proposed interview (usually at least seven days – notice period will depend upon complexity and details of matter). The letter must:

- specify in detail the issue/s alleged – this requires clarity with sufficient detail to enable an accurate response; and
- give such relevant information that will fairly enable the member to respond – this might include the date, time, location, and details of the alleged incident.

The member is to be advised that he/she may also bring any written submissions to the interview and is to be given seven days (or longer in complex matters) from the interview to provide any further written submissions. The member is also advised that he/she may bring an observer.

Where the member requests an extension of time, the investigator may agree to any extension of time which is reasonable, having regard to the overall circumstances of the case and the need to ensure procedural fairness.

### ***Notification and advice***

A member facing an allegation of misconduct, called to an interview as part of the investigation must be provided with:

- at least 24 hours' notice of the interview;
- notification of the time, date, location, nature and purpose of the interview and the names and titles of the members conducting the interview;
- a copy of these procedures;
- the allegations it is intended to canvass at the interview. Provide the details of the allegation/s as best known at this point in time. If the matter concerns a public interest disclosure the identity of the person who made the disclosure is only to be disclosed if it is essential having regard to the principles of procedural fairness – that is, essential for the person to be able to respond to the allegations;
- the opportunity to make comment on any relevant issue, and to give his or her version of the relevant event/s;
- advice that an observer (who may be a representative from the NSW SES Volunteers Association but usually not a practising legal practitioner) may be present. It is not appropriate to have a representative or observer who has been involved in the matter, or whose availability would mean an unreasonable delay in the matter proceeding;
- advice that the role of an observer is as a witness or adviser and not as an advocate. The observer should be told the name of a Departmental member to whom any complaint of unfairness may be made;
- a signing or language interpreter, if the member has a hearing impairment, or English as a second language and the member's communication difficulties warrant this consideration; and
- advice that a copy of the record of interview/statement will be provided and an indication of when it will be made available.

## **3.11 Procedure for interviews**

### ***General***

- interviews with the member the subject of allegation/s may be sound recorded but only with the knowledge of the person being interviewed. If the interview is recorded it may be transcribed and a copy given to the member. The interviews will be conducted by the members (investigators) appointed to conduct the investigation. Where possible a copy of the tape or disc should be provided to the member interviewed
- the interviews will be conducted in private, and
- the investigators have the responsibility to be fair, courteous and impartial.

### ***Commencing the interview***

The investigator must:

- advise the member that the interview will be recorded and the method that will be used. Sound recording may be suspended temporarily and replaced by note taking if particular circumstances warrant such and it has been requested by the member
- advise the member of the purpose of the interview
- advise the member/observer that if they have chosen to have an observer present, that the role is that of witness or adviser and not of advocate, and that their presence is a safeguard against unfair practices
- advise the member/observer that if they wish to have a private discussion they should request a halt to proceedings
- advise the member that he/she will have an opportunity to fully respond to the questions asked and to provide comments with respect to relevant issues, which includes giving their version of the events in question, and
- advise the member that it is in their best interest to answer questions and have their version of events recorded.

### ***During the interview***

The investigator must:

- put each allegation/incident to the member and invite him/her to respond
- interview the person in relation to his/her response or other matters in relation to the allegation
- avoid accusatory or intimidating language or tone of voice
- avoid making comments about the answer given
- not indicate personal views or opinions or those of other people, and
- ask the member if there is anything else they wish to say.

### ***Concluding the interview***

Investigators should not indicate that any view has been formed.

Investigators must advise the member:

- that following the completion of the investigation that an Investigation Report will be provided to the Commissioner or other Decision Maker;
- a decision will be made by the Commissioner/Decision Maker based on the facts and available information contained in the Investigation Report;
- that the member will be notified in writing of the outcome and where misconduct is established, the proposed action to be taken;
- that he/she will be given an opportunity to make submissions to the Commissioner or other Decision Maker in relation to any proposed action before it is implemented – the submission may also include comments on the Investigation Report and if applicable on the opinion of the Commissioner that the member has engaged in misconduct; and



- when a copy of the record of interview/statement will be available for signature.

### 3.12 Obligations post interview

Following interview, the investigator/s must:

- prepare the record of interview/statements as soon as possible
- provide the member and other witnesses with the opportunity to read their record of interview/statement and invite him/her to read and sign the document
- any issues about the content of the record of interview/statement should be discussed and resolved between the parties. The record of interview/statement should be altered to reflect the agreed changes.

### 3.13 Victimization or harassment

If a witness informs the investigator that he/she is being victimised or harassed by the member who is the subject of a misconduct investigation, the investigator should:

- Inform the witness that they are not required to speak to the member and that the alleged victimisation/harassment should be reported to the Professional Standards Unit; and
- Not attempt to inquire into any such allegation because it is a separate allegation and requires independent consideration and report the allegation in writing to the Professional Standards Unit, so that the complaint can be dealt with.

### 3.14 The Investigation Report

The investigator examines the evidence and analyses any submission received from the employee. The investigator will prepare an Investigation Report that:

- Consolidates all the material gathered during the investigation process;
- Details the allegations involving the employee;
- Outlines the investigation process followed;
- Provides a factual analysis of the evidence;
- Provides the investigator's view on the relevant facts as to whether, on the balance of probabilities, the employee has engaged in the alleged conduct, referring to material upon which the view is based;
- Provides an assessment of whether the conduct appears to constitute misconduct if the investigator believes that the conduct as alleged has occurred;
- Sets out the investigator's comments and recommendations on systemic or operational matters identified during the investigation that need to be addressed;
- Includes all relevant attachments, such as correspondence with the employee, disciplinary and other interviews, and witness statement/s.

The investigator will then refer the Investigation Report to the Manager Professional Standards, who will review and then forward the report and any supplementary evidence to the Decision Maker for them to consider and make a determination on the matter.

### **Further inquiries following receipt of the Investigation Report**

The Decision Maker may, for any reason including matters raised by either the member the subject of the allegation or the Investigator in the Investigation Report, decide to have a further inquiry.

However, if any further inquiry results in further allegations of misconduct and the Decision Maker decides these allegations are to be treated as a disciplinary matter, the steps outlined above are to apply.

## **3.15 Initial decision stage**

### ***Opinion of whether misconduct***

In forming an opinion of whether the member has engaged in misconduct, the Decision Maker may only take into account those matters disclosed in the Investigation Report, and any supporting evidence or material underpinning the report.

The Decision Maker may seek specialist advice (including legal) prior to forming an opinion but any final opinion must be the responsibility of the Decision Maker.

NSW SES bears the onus of proving that the member engaged in misconduct as alleged. The standard of proof required is that required in civil proceedings. That is, the Decision Maker may find the allegation/s of misconduct proven only if he or she is satisfied of the relevant facts on the balance of probabilities. This is a lower standard of proof than the criminal standard of 'beyond a reasonable doubt.'

### ***Misconduct allegation/s not made out or no misconduct***

The Decision Maker may determine that the facts do not support the allegation of misconduct. In this case the Decision Maker may determine that misconduct is not sustained and will advise the member and complainant in writing.

The materials in relation to the matter including the Investigation Report are to be removed from any personnel records or files held in relation to the individual member.

### ***Exercise of discretion in determining disciplinary action or otherwise when of opinion member engaged in misconduct***

A Decision Maker, when of the opinion that the member has engaged in misconduct, must exercise discretion in making a determination. In determining the appropriate course of action, the Decision Maker should not adopt a policy that a particular conduct will always attract the same disciplinary penalty. Advice may be sought from specialists (Departmental and legal) prior to making a determination.

The Decision Maker is not obliged to impose a disciplinary action penalty on a member who has been found to have engaged in misconduct.

If the Decision Maker determines that misconduct has occurred, they may decide to the following:

- Dismiss the matter and/or take no further action;
- Take no further action against the member but to take management action to address any systems or organisational issues;
- Take remedial action with respect to the member;
- Take disciplinary action against the member;

When determining an appropriate course of action following a finding that misconduct is proven, the Decision Maker needs to consider:

- the facts of the case;
- the nature and seriousness of the proven misconduct, including the effect and circumstance of the incident;
- whether the member poses an ongoing risk to NSW SES or other members;
- the employment/service history and general conduct history of the member;
- whether the conduct or substantially similar conduct has previously been the subject of previous remedial or disciplinary action;
- whether policy and procedures applicable to the conduct were in place, were known, were being followed or required to be followed;
- mitigating or extenuating circumstances if available at this stage;
- any personal circumstances of the member and whether these may have contributed to any misconduct, e.g. health issues, particular stressors on the member;
- the effect of the proposed action on the member.

Matters outside the investigation report and supporting documentation, such as employment/service records, monitoring programs and substantiated disciplinary matters may be taken into account when deciding whether disciplinary action is appropriate and if so what action should be taken.

### ***Misconduct proven – no further action***

If the Decision Maker is of the opinion the member has engaged in misconduct but that no further action is to be taken given the facts of the particular case, the member must be notified in writing of that opinion with details of the misconduct and the decision to take no further action.

### ***Engaged in misconduct – remedial action***

If the Decision Maker is of the opinion the member has engaged in misconduct but that remedial action is appropriate given the facts of the particular case, the member must be notified in writing of that opinion with details of the misconduct and the remedial action to be taken.

Where the proposed remedial action is the transfer to another position that would require the member to change residence, then the member must be given an opportunity to make a submission with respect to such proposed remedial action before it is implemented. The Decision Maker should be satisfied the member has no valid reason for refusing the transfer.

### **3.16 Member engaged in misconduct - disciplinary action being considered**

If the Decision Maker is of the opinion a member has engaged in misconduct **and** that disciplinary action may be appropriate, the member must be notified in writing of that opinion and of the disciplinary action being considered, including the severest penalty.

The member is to have an opportunity to make a submission in relation to the disciplinary action being considered.

The written notification must state:

- the details of the misconduct that the Decision Maker is of the opinion the member has engaged in;
- the disciplinary action penalty/ies being considered, including the severest penalty that is being considered for the particular matter;
- that the member has 14 days from the receipt of the written notice to make a submission and to provide any additional information which he/she considers should be taken into account in relation to the disciplinary action being considered before a final decision is made.
- the Decision Maker has discretion to extend the period for response if the member applies for additional time and provides reasonable grounds for seeking the extension;
- if the proposed disciplinary action under consideration was withdrawal of NSW SES membership in the case of a volunteer member, the member's rights of appeal as set out within the NSW SES Volunteer Membership Policy; and
- that these further submissions and/or additional information will be considered before a final decision is made to implement the disciplinary action being considered.

Each step in the disciplinary process must be taken and documented before the Decision Maker/Commissioner may make a final decision.

### **3.17 Implementation of final decision stage**

All stages including the final decision stage must be made in a timely and expeditious fashion.

The Decision Maker/Commissioner having considered any submission made by the member in respect to the disciplinary action being considered shall make a final decision.

If made, the Decision Maker/Commissioner shall also consider any submission made on behalf of the member by the NSW SES Volunteers Association prior to making a final decision.

A final decision may consist of disciplinary action, remedial action or no further action. The Decision Maker is not precluded at this stage from ordering remedial action in conjunction with disciplinary action. For example, a Decision Maker may consider that a member should be reprimanded for their conduct, transferred to another location and directed to undertake training in certain policies relating to the area of misconduct.

Following the final decision, the Decision Maker will advise the member in writing of the final determination and its date of effect.

### **3.18 Legal advice**

Although there is no right to formal representation during an interview with the Decision Maker, all parties have a right to access their own legal advice throughout the investigative and disciplinary process. This includes the member who is subject to the allegations, the investigator and the Decision Maker.

### **3.19 Rights of Appeal**

In the case of a volunteer member, if the disciplinary action imposed was withdrawal of membership and/or revocation of appointment to a Local or Unit Controller position, they have rights of appeal as currently defined within the NSW SES Volunteer Membership Policy.

Apart from these circumstances, there will be no other internal right of appeal of a decision as to disciplinary action.

### **3.20 Records relating to disciplinary action**

The Commissioner must remove from a member's personnel record:

- (a) Any record of disciplinary action if the action taken was a caution or reprimand; and
- (b) Any record of any remedial action taken

If the member has been of good behaviour for at least two years since the taking of the action.

Confidential records of disciplinary matters will be retained by the NSW SES Professional Standards Unit in accordance with the *State Records Act 1998*.

## Document Control

Title	NSW SES Dealing with Allegations of Misconduct Procedures – Volunteer members
Document ID	Dealing with Allegations of Misconduct Procedures – Volunteer members v1.0
Current Version #	1.0
Document Approval Status	Approved
Policy Sponsor	Director People and Culture
Policy Owner	Manager Professional Standards
Classification	NSW SES-IN-CONFIDENCE
Effective date	05 December 2016
Next Review Date	05 December 2018
Key Words	Misconduct, Procedure, Procedural Fairness

## Version History

Version #	Version creation date	Position/Author	Summary of changes
0.01	14 December 2015	Manager Professional Standards – Gary Bevan	Initial draft
0.02	12 July 2016	Manager Professional Standards – Gary Bevan	Second draft
0.03	21 July 2016	A/Policy Officer – Louise Pallier	Edits
0.04	9 August 2016	Manager Professional Standards – Gary Bevan	Final review prior to release for formal consultation

## Approvals

Name	Title	Date	Version signed off
Gary Bevan	Manager, Professional Standards	2 Dec 2016	V1.0
Kathleen Iacurto	Director, People and Culture	5 Dec 2016	V1.0
Greg Newton	Acting Commissioner	5 Dec 2016	V1.0