

Staff Underperformance and Misconduct Policy

Policy Number:	2008/03
Approved by:	Heritage Management Committee – 10 September 2008; 13 November 2012; 17/07/2018
Last reviewed:	August 2008; November 2012; June 2018
Next review due:	2021
National Law and Regulations	National Law Sections 166, 167, 174. National Regulations 168(i)(i), 12, 84, 155, 175, 176
National Quality Standard	Quality Areas: 4 and 7. Related Quality Areas: 2, 5, 6
EYLF	Principle 1: Secure, respectful and reciprocal relationships

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Policy Statement

Heritage Early Childhood Centre (Heritage) understands that professional accountability in early childhood services is vital. Heritage plays an important role in the provision of services to the community and this places all our educators and other staff members in a position of trust and responsibility. In addition, early childhood professionals have a significant influence on their relationships with children, families, colleagues and the community.

Heritage endeavours to assist all staff members to perform to a high standard through developing a service culture that encourages on-going feedback about performance issues in an open and supportive way; upholding the Heritage Code of Conduct (Ethics); the provision of duty statements and setting performance objectives against Heritage goals; training in all service policies and procedures; and relevant professional development opportunities.¹ All Heritage supervisors and management, including Room Leaders, the Director and Management Committee are responsible for identifying, preventing and responding to inappropriate workplace situations.

Heritage understands that services that manage staff Underperformance and Misconduct appropriately and sensitively benefit from motivated staff who perform at their best. Conversely, it is understood that when issues are not addressed, it can lead to unproductive outcomes that affect the workplace environment, undermine confidence in management and reduce the quality of the service provided. This policy is designed to set out a clear process for defining and managing staff Underperformance and Misconduct. Dealing with Underperformance and Misconduct can be challenging and confronting for both management and staff and clear procedures, organisational support and on-going training is required so supervisors and management have the confidence and willingness to manage issues.

This policy has been developed to meet *the Education and Care Services National Regulation 168(i)(i)* which requires the service to have policies and procedures in relation to a code of conduct for staff. In addition, this policy supports the Heritage Philosophy, Code of Conduct (Ethics), Employment and Staffing Policies, Staff Complaints and Grievance Management Policy, and the Heritage Enterprise Agreement 2013. It is also consistent with the Australian National University's policies on underperformance.

Heritage understands the importance of recognising the difference between poor performance/ Underperformance and Misconduct. Poor/Under-performance is when an employee tries but falls short of the standard required because they lack skill, ability or training for example. In cases of Misconduct, the employee could perform better but for whatever reason deliberately chooses not to. For this reason, procedures for dealing with staff underperformance and Misconduct (including Serious Misconduct) are dealt with separately in this policy. Where a staff member is not able to meet agreed performance standards, action will be taken to address the underperformance such as training and guidance. Where a staff member deliberately does not demonstrate appropriate conduct in accordance with the Heritage Code of Conduct (Ethics), action will be undertaken to improve the staff member's conduct as appropriate, including possible disciplinary action. In the case of Serious Misconduct, after due process and where the standard of proof is deemed to be met, ie, "that it is more probable than not that the matter occurred", the staff member's employment will be immediately terminated.

The principles of procedural fairness will be applied to all underperformance and Misconduct processes. The preferred outcome is that a staff member will improve their performance or conduct and contribute to the ongoing success of Heritage Early Childhood Centre. Privacy and confidentiality will be respected when managing all underperformance and Misconduct issues. Management and staff understand that Heritage has a legal obligation to report certain Misconduct to the police, the ACT Regulatory Authority, and other relevant authorities as appropriate including Child and Youth Protection Services, and the ACT Ombudsman, under the ACT Reportable Conduct Scheme, 2017.

¹ **Refer to:** Employment and Staffing Policies

Policy Aims

The Heritage Staff Underperformance and Misconduct Policy aims to ensure:

- Heritage consistently provides high quality early childhood education and care.
- Staff are motivated and perform at their best.
- Management is confident in handling Underperformance and Misconduct issues.
- Heritage fulfills its duty of care to ensure the health, safety and wellbeing of the Heritage community is protected.
- Compliance with current legislation and best practice² guidelines from respected authorities in relation to staff conduct.
- The Heritage Code of Conduct (Ethics) is adhered to by all educators and other staff.
- A transparent, accountable and effective management process is achieved through the development of clear procedures, determining who is responsible and regular policy review in consultation with the Heritage community.

Scope

The following policy and related procedures apply to all Heritage permanent and casual staff, including the Director.

Rationale

Heritage recognises it has a duty of care to take all practicable steps to provide a safe and healthy work environment for the Heritage community that supports the emotional and physical wellbeing of employees and children (*Work Health and Safety Act, 2011*). In addition, this policy has been developed to comply with the:

- *Education and Care Services National Law (ACT) Act 2010*.³
- *Education and Care Services National Regulations 2011*.⁴
- *Quality Standard for Early Childhood Education & Care & School Age Care 2012*.⁵
- *Children and Young People Act 2008*.
- *Reportable Conduct and Information Sharing Legislation Amendment Act 2016*.
- Heritage Philosophy Statement.
- Heritage Code of Conduct (Ethics).
- Heritage Employment and Staffing Policy and Procedures.
- Heritage Staff Complaints and Grievance Management Policy and Procedures.
- United Voice and Heritage Enterprise Agreement (2013).

Definitions

Underperformance: Underperformance is defined as repeated failure by a staff member, as identified, assessed and documented by a supervisor, to meet the performance standards expected of their position as set out in their Duty Statement or other relevant service document. It includes poor performance as identified and documented by a supervisor on a staff member's Probation Report/Annual Appraisal Form. Examples include:

- Poor time management.
- Poor attitude or repeated apathy.
- Poor communication with families, other educators and children.
- Failure to perform daily tasks and implement program to the required standard, eg, not keeping focus children's notes up-to-date or failing to complete child developmental summaries within the agreed due date. ⁶

² Refer to: Early Childhood Australia's Code of Ethics; Educator Handbook 2018.

³ Refer to: Appendix 4: Relevant National Law, National Regulations and Quality Standards.

⁴ Refer to: Appendix 4: Relevant National Law, National Regulations and Quality Standards.

⁵ Refer to: Appendix 4: Relevant National Law, National Regulations and Quality Standards.

⁶ Refer to: Appendix 1: Identifying Common Underperformance Issues; Appendix 2: Further Examples of Misconduct and Serious Misconduct

Misconduct: Misconduct means deliberately neglecting duties or conduct that contravenes the Heritage Code of Conduct (Ethics). Examples of behaviour which may be examined as possible Misconduct include:

- Failure to comply with policies and procedures.⁷
- Failure to comply with a reasonable instruction given by a supervisor.
- Bullying behavior that may be reasonably understood and assessed by a supervisor to be harassing, intimidating, overbearing or physically or emotionally threatening (for example, racist comments, name-calling, put-downs, snide remarks, etc), or other unsatisfactory conduct which breaches the Heritage Code of Conduct (Ethics).
- Conduct that is identified by a supervisor as preventing the satisfactory performance of the work of the staff member or other staff members at Heritage.
- Any action of the staff member which is identified and assessed by a supervisor to be harmful to the wellbeing, health or safety of members of the Heritage community, including other staff, children, families or members of the public.
- A conviction, sentence or other order imposed by a court which restricts the activities of a staff member in a manner that constitutes an impediment to the staff member carrying out their duties.⁸

Serious Misconduct: Serious Misconduct means:

- Recurrence or continuation of conduct which has been previously found to be Misconduct on the part of the staff member.
- Refusal to enter into or follow a Conduct Agreement.⁹
- Serious misbehaviour, which may be a single occurrence, of a kind which involves either any of the following or conduct of similar seriousness:
 - A serious risk to the safety of children, staff, or visitors to Heritage.
 - A serious impediment to the carrying out of a staff member's duties, or to other staff carrying out their duties.
 - A serious risk to Heritage's property.
 - A serious dereliction¹⁰ of duties.
 - A conviction by a court of an offence which constitutes a serious impediment to the carrying out of the staff member's duties.
- Behaviour that constitutes Serious Misconduct which can take many forms¹¹ but could include Physical, Sexual or Emotional Abuse¹² of children, serious and/or persistent harassment or bullying of staff or children, or a criminal offence such as theft, fraud or assault.

Disciplinary Action: Disciplinary action may involve one or more of the following:

- Formal counselling of a staff member by an appropriate supervisor.
- Giving a staff member a written warning (including, where appropriate, a final warning).
- Censure of a staff member.¹³
- Demotion of a staff member.
- Other action as recommended by the Heritage Management Committee; or
- In the case of continued Underperformance or an instance of Serious Misconduct, termination of a staff member's employment.

Notifiable Complaint: Under the *Education and Care Services National Regulations 2011*, a Notifiable Complaint is defined as a complaint/grievance which must be reported by the

⁷ Refer to: Non-Compliance Policy

⁸ Refer to: Appendix 2: Further Examples of Misconduct and Serious Misconduct

⁹ Refer to: Procedures for Managing Misconduct or Serious Misconduct

¹⁰ Deliberate or Accidental Failure to Perform Duties

¹¹ Refer to: Appendix 2: Further Examples of Misconduct and Serious Misconduct

¹² Refer to: Child Protection Policy and Procedures

¹³ Formal Expression of Disapproval by a Supervisor

Management Committee to the ACT Regulatory Authority (CECA) within 24 hours of the complaint/grievance being lodged against a staff member where an allegation is made that:

- A 'Serious Incident' has occurred or is occurring.¹⁴
- The *Education and Care Services National Law 2010* or *National Regulations 2011* have been contravened.

Reportable Conduct: Under the ACT Reportable Conduct Scheme, Reportable Conduct is defined as child-related Misconduct (whether allegations or convictions) engaged in by an employee of Heritage (including family volunteers and others engaged to provide services to children) of Heritage, whether or not in the course of employment with Heritage and regardless of a child's consent. Reportable Conduct includes:

- Sexual offences and convictions where a child is a victim or is present.
- Offences against the person, including physical offences and convictions, where a child is a victim or is present.
- Conviction, or finding of guilt, under a territory law or a state or Commonwealth law, involving reportable conduct.
- Offences against the *Education and Care Service National Law 2011*, sections 166 and 167 (inappropriate discipline or offences relating to protecting children from harm).¹⁵
- Ill-treatment of a child (including emotional abuse, hostile use of force/physical contact, neglect and restrictive intervention).
- Psychological harm to a child.
- Misconduct of a sexual nature. There are three categories of sexual Misconduct: crossing professional boundaries; sexually explicit comments and other overtly sexual behaviour, and grooming behaviour.¹⁶

Reportable Conduct does not include conduct:

- That is reasonable discipline, management or care of a child taking into account the characteristics of the child, and any relevant code of conduct or professional standard that at the time applied to the discipline, management or care of the child; of
- If the conduct is investigated and recorded as part of work procedure that is trivial /negligible.
- Prescribed by regulation.

Refer to: Reportable Conduct Policy

Child Abuse: Under the *ACT Children and Young People Act 2008*, Child Abuse is defined as types of maltreatment that endangers a child/young person's safety, wellbeing, and development. Child abuse can be a single incident or a chronic pattern of behaviour over time and may be intentional or unintentional.¹⁷

Neglect: Under the *ACT Children and Young People Act 2008*, Neglect is defined as a failure to provide a child/young person with the basic needs for his/her physical, emotional/psychological and intellectual development. It may be chronic or episodic.¹⁸

Sexual Harassment: The legal definition of sexual harassment under Workplace Discrimination law is an unwelcome sexual advance, unwelcome request for sexual favours or other unwelcome conduct of a sexual nature which makes a person feel offended, humiliated or intimidated, and where a reasonable person would anticipate that reaction in the circumstances.

Discrimination: The legal definition of discrimination under Workplace Discrimination law is treating, or proposing to treat, someone unfavourably because of a personal characteristic protected by law. *The Discrimination Act 1991 (ACT)* sets out personal characteristics that make discrimination in employment against the law.

¹⁴ Refer to: Appendix 4: National Regulation 12, Definition of Serious Incident

¹⁵ Refer to: Appendix 4: National Regulation 12, Definition of Serious Incident

¹⁶ Refer to: Reportable Conduct Policy

¹⁷ Refer to: Child Protection Policy

¹⁸ Refer to: Child Protection Policy

Bullying: Bullying at work is defined by the Fair Work Act 2009 as when a person or a group of people behaves unreasonably and repeatedly towards a worker or a group of workers while at work, and the behaviour creates a risk to health and safety.

Strategies and Practices

Privacy and Confidentiality

In dealing with staff Underperformance and Misconduct, Heritage recognises the need for privacy and confidentiality.

- Heritage is committed to ensuring privacy and confidentiality in the management of staff Underperformance and Misconduct.
- Management of staff Underperformance and Misconduct will be held in confidence with those individuals directly involved.
- Heritage management and staff understand there may be a requirement to disclose information to a third party when directed by legislative regulations. For example, a government agency may need to be informed.¹⁹

Conflict of Interest

In dealing with staff Underperformance and Misconduct, Heritage recognises a conflict of interest may arise. For example:

- If a staff member is concerned that the Director is not demonstrating performance to a satisfactory standard or the Director is not demonstrating appropriate conduct in accordance with Heritage's Code of Conduct (Ethics), then a conflict of interest occurs, and it is unlikely that the Director would be able to apply Heritage's Staff Underperformance and Misconduct Policy and procedures fairly or the decision-making process would be unbiased.
- Where a conflict of interest is identified an alternative arrangement should be sought.
 - In the case of a conflict of interest regarding the Director, the Chair of the Heritage Management Committee and/or the Human Resources Officer would be the appropriate supervisor/s of the Director.
 - In the case of a conflict of interest regarding a parent who is also a member of the Heritage Management Committee, the parent would be required to be absent from any discussion regarding the issue when under consideration by the Committee.

Procedures for Managing Underperformance

Understanding Underperformance

Heritage understands there are many reasons why an employee may perform poorly including:

- A staff member does not know what is expected because goals or workplace policies and consequences are not clear.
- Interpersonal differences.
- Mismatch between staff member's capabilities and job they are required to undertake, or staff member does not have the knowledge to do job expected of them.
- Staff member does not know whether they are doing a good because of a lack of feedback on their performance.
- Lack of personal motivation, low morale in workplace or poor work environment.
- Personal issues such as family stress, physical and/or mental health problems or problems with drugs or alcohol.
- Cultural misunderstandings.
- Workplace bullying.²⁰

Heritage management will endeavour to assist staff members to perform to a high standard through:

¹⁹ Refer to: Section on Reporting Obligations

²⁰ Refer to: Appendix 1: Identifying Common Underperformance Issues



- Encouraging a service culture and policies and procedures which encourage on-going feedback about performance issues in an open and supportive way.
- Developing best practice²¹ recruitment processes and providing a probation period during when educators' shadow or are mentored by more experienced educators.
- The provision of clear Duty Statements and the setting of performance objectives against Heritage goals.
- Regular feedback through performance appraisals.
- The provision of professional development opportunities, where possible.

Step 1: Identify and Analyse the Problem

Where a supervisor assesses that a staff member is not able to demonstrate performance to a satisfactory standard, the supervisor must firstly write down specific examples of the behaviour that's causing an issue, and when it is occurring. Then assess and document:

- How serious is the problem?
- How long has the problem existed?
- How wide is the gap between what is expected and what is being delivered?
- How is it impacting the workplace?

Once the problem has been identified and assessed, the supervisor will proceed with Step 2: Information Action, or, if informal action is deemed inappropriate, proceed to Step 3: Formal Action.²²

Step 2: Informal Action – Verbal Discussion

The supervisor will:

- Informally and sensitively discuss with the staff member the deficiencies in their performance as per the General Guidelines for Discussing Underperformance issues.
- Record on the staff member's file that the discussion took place, the date and the content of the discussion.

Guidelines for Discussing Underperformance Issues

- Ensure any discussions take place at a convenient time and in a comfortable, private and non-threatening environment.
- Be sensitive and begin by referring to the employee's strengths.
- Explain the expected performance standard with reference to their Duty Statement and/or any relevant service documents where appropriate.
- Talk about the issue, not the person.
- Provide an opportunity for response and explore the reasons there is an issue.
- Clarify details.
- Listen carefully to any reasons given as to why the problem is occurring.
- Check that the employee:
 - Is aware of the task required of them
 - Has been shown what is required
 - Understands the gap between what is happening and what is required
- Stay relaxed and encouraging.
- Summarise to check understanding of the situation
- Discuss preferred outcomes, using every-day language rather than 'performance management speak'.
- Jointly devise solutions
- Offer assistance such as training, mentoring, redefining roles.

Adapted from: FairWork Ombudsman Best Practice Guide for Managing Under-performance.²³

²¹ Refer to: Employment and Staffing Policy and Procedures

²² Refer to: Appendix 1: Identifying Common Underperformance Issues



Step 3: Formal Action

Stage 1: Written Warning

- Where a staff member is not able to demonstrate performance to a satisfactory standard and informal action has failed or is not appropriate, the supervisor will bring it to the attention of the Director, who will inform the staff member in writing that formal procedures will commence.
- The letter will outline the identified problem and how it is affecting the workplace.
- The staff member will also be informed they have **5 working days** to respond in writing to the Director's concerns and if formal action proceeds, a meeting will be held at which they have the right to respond and an action plan will be jointly devised in the form of a Performance Improvement Agreement (see below).
- **Note:** The staff member must be informed that they have the right to choose to be assisted by a staff representative at meetings and when developing a Performance Agreement.
- A note to that effect will be made on the staff members' file and in the Warnings, Grievances and Issues Folder.

Stage 2: Formal Meeting and Developing a Performance Improvement Agreement ²⁴

The Director will arrange a meeting with the staff member at a convenient time and in a comfortable, private, non-threatening environment and respectfully discuss with the staff member:

- The roles, responsibilities and performance standards required under their Duty Statement and/or other relevant service documents.
- In what areas these performance standards are perceived as not being met
- Any evidence, notes and documents that demonstrate Underperformance.
- The staff member's response and what they think can be done to improve.
- The joint development of a formal Performance Improvement Agreement Example, below.
- What will happen if performance doesn't improve, ie Stage 3: Disciplinary Action.

Formal Performance Improvement Agreement

A Performance Improvement Agreement will specify the:

- Any informal action taken to date, if relevant.
- Clarification of roles and responsibilities and required performance standards in line with the Duty Statement and/or any other relevant service documents.
- Performance problem identified and how it is affecting the workplace.
- Actions to be taken to correct this.
- Training or counselling where relevant.
- Timeframe during which the performance will be closely monitored (between two weeks and not more than three months).
- The dates of regular meetings to monitor and encourage the employees' performance.
- Possible action resulting from any deliberate breach.

The Performance Improvement Agreement will be signed, include the staff member's written comments and be stored in the staff members' file.

²³ Refer to: Fair Work Ombudsman: Managing underperformance: The 'Initial Steps' Checklist
<https://www.fairwork.gov.au/how-we-will-help/templates-and-guides>

²⁴ Refer to: Performance Improvement Plan Template and Underperformance Meeting Template
<https://www.fairwork.gov.au/how-we-will-help/templates-and-guides>



Resolution

- Following the completion of the monitoring period as outlined in the Performance Improvement Agreement (see above), the Director will assess and document whether performance standards have been met and whether the issue has been resolved.²⁵
- If deemed to have been met, formal Underperformance procedures will cease, and a letter written to this effect, explaining performance standards must continue to be maintained. If performance standards are not deemed to be met, the Director will continue to Stage 3.

Stage 3: Disciplinary Action Including Termination

- Where performance continues to remain unsatisfactory, the Director will advise the staff member in writing of the intended disciplinary action, giving reasons for the action. In the case of termination of employment, permanent staff will be given notice as required by law.²⁶
- The staff member may dispute this disciplinary action in writing within **5 working days** by referring the matter to the Heritage Management Committee. During this time, the staff member may be suspended from duties with or without pay.²⁷

Resolution by Heritage Management Committee in Case of Dispute

- Following consideration of the Director's recommendations and any response from the staff member, the Chair and/or Human Resources Officer (or those acting in these positions) will decide the matter and advise the staff member and Director of its decision within **1 week** of receiving the staff member's dispute claim.
- Should the Heritage Management Committee recommend termination of a permanent staff member's employment on the basis of Underperformance, they will be given notice and entitlements as required by law,²⁸ effective from the date of the Committee's decision.

Procedures for Managing Misconduct and Serious Misconduct

Members of staff are expected to demonstrate appropriate conduct in accordance with the Heritage Code of Conduct (Ethics).

Step 1: Identify and Analyse the Problem

- Where a staff member is assessed by a supervisor to deliberately fail to display appropriate conduct, the supervisor will make notes of the incident/s and assess their seriousness and impact on the workplace.
- Once the problem has been identified and assessed, the supervisor will proceed with Step 2: Information Action, or, where informal action is deemed inappropriate, proceed to Step 3: Formal Action: Misconduct or Step 4: Formal Action: Serious Misconduct.²⁹

Step 2: Informal Action – Verbal Discussion

The supervisor will informally discuss with the staff member the alleged inappropriate behaviour. The discussion will take place in a comfortable, private, non-threatening environment and respectfully handled. The Room Leader will:

- Explain what the issue is, how it is affecting the workplace and what the expected behavior is.
- Provide an opportunity for response.
- Record on the staff member's file and in the Warnings, Grievance and Issues Folder that the discussion took place, the date and the content of the discussion.

²⁵ Refer to: Appendix 3: Checklist for Formally Managing Underperformance

²⁶ Refer to: United Voice and Heritage Enterprise Agreement 2013

²⁷ Refer to: Section on Suspension During Committee Review

²⁸ Refer to: United Voice and Heritage Enterprise Agreement 2013

²⁹ Refer to: Definitions; Appendix 2: Further Examples of Misconduct and Serious Misconduct

- Where appropriate, depending on the nature of the Misconduct, the Room Leader or Director will provide guidance, counselling or other relevant action to assist the staff member to improve their conduct.

Step 3: Formal Action: Misconduct

Written Warning

Where the informal process does not result in appropriate conduct, or if the informal process is not appropriate, the Room Leader will refer the matter to the Director. The Director will investigate the matter as soon as possible and gather all relevant facts. This may include:

- Interviewing the relevant people and witnesses and/or
- Gathering and assessing relevant documents/evidence.³⁰

Where the Director identifies that the matter appears to constitute Serious Misconduct³¹, it will be treated as such under 'Step 4: Formal Action: Serious Misconduct – Termination'.

Otherwise, the Director will provide to the staff member in writing:

- Clear details about the alleged Misconduct and the required standard of conduct.
- A copy of the Heritage Code of Conduct (Ethics), other relevant documents and this policy.
- Any action to be taken to address the matter such as the development of a Conduct Agreement (see below) and meetings to monitor conduct.
- The staff member has the right to choose to be assisted by a staff representative at meetings and when developing a Conduct Agreement;
- A caution to the staff member that failure to meet the required standard of conduct may lead to the initiation of Serious Misconduct procedures. A note to this effect will be placed on the staff member's file and Warnings, Grievances and Issues Folder.

Formal Conduct Agreement

A Conduct Agreement will specify:

- Informal action taken to date, if appropriate.
- The required standard of conduct.
- Clear details about the problem.
- Actions to be taken to address the problem.
- The timeframe during which the conduct will be closely monitored (between two weeks and not more than three months).
- Training, counselling and associated leave, where relevant.
- The dates of regular meetings.
- Possible action resulting from any deliberate breach.

The Conduct Agreement must be signed, include the staff member's written comments and be stored in the staff member's file.

Resolution

Following the completion of the monitoring period as outlined in the Formal Conduct Agreement, the Director will assess and document whether the issue has been resolved. If standards are deemed to have been met, formal Misconduct procedures will cease, and a letter written to this effect, explaining conduct standards must continue to be maintained.

Should the Misconduct continue, the Director will proceed to 'Step 4: Formal Action: Serious Misconduct – Termination of Employment'.

³⁰ Investigation and risk assessment templates are available to help this process at: <http://www.ombudsman.act.gov.au/reportable-conduct-scheme/resource-kit>

³¹ Refer to: Definitions; Appendix 2: Further Examples of Misconduct and Serious Misconduct

Step 4: Formal Action: Serious MisconductTermination of Employment

Serious Misconduct is deemed to occur where the:

- Misconduct continues or recurs.
- Staff member refuses to enter into or follow a Conduct Agreement; or the
- Nature of the allegation is regarded by the Director to constitute Serious Misconduct.³²

In this case:

- The Director will advise the staff member in person of the termination of their employment, effective immediately, and also provide the opportunity for the presence of a support person at the meeting and written confirmation.
 - According to the Human Rights Commission the advice of termination of employment is a matter of such significance that basic human dignity requires that dismissal be conveyed personally with arrangements for the presence of a support person and documentary confirmation, unless there are extenuating circumstances.
- Permanent staff given notice and entitlements as required by law.³³
- On termination of employment, staff must complete an Employment Separation Certificate in order to be paid their correct allowances by CentreLink.³⁴
- Staff have the right to respond under the Staff Complaints and Grievance Management Policy and may dispute this disciplinary action in writing within **5 working days** by referring the matter to the Heritage Management Committee. During this time, the staff member may be suspended from duties.³⁵

Resolution by Management Committee in Case of Dispute

- Following consideration of the Director's recommendations and any response from the staff member, the Chair and/or Human Resources Officer (or those acting in these positions) will review the matter to determine whether there is a case of Serious Misconduct.
- Before commencing any review, the Chair and/or Human Resources Officer will inform the staff member of the nature of the allegation(s) and provide a copy of the Director's report.
- The staff member will have **5 working days** from receipt of the Director's report to submit a written response. After receiving the staff member's response, the Committee will finalise the review of the matter. This process must be carried out as soon as possible and all relevant facts gathered. This may include:
 - Interviewing the relevant people and witnesses and/or
 - Gathering and assessing relevant documents/evidence.
- Once the review is complete, the Chair and/or Human Resources Officer will decide if the standard of proof has been met, ie, "that it is more probable than not that the matter occurred, and will either to:
 - Take no further action.
 - Take disciplinary action where there is a finding of Misconduct (Step 3: Formal Action – Misconduct); or
 - Take any disciplinary action as appropriate where there is a finding of Serious Misconduct.
- The Director and staff member will be advised in writing of the outcome of the review by the Chair and/or Human Resources Officer.
- The Chair and/or Human Resources Officer may, at any time while these procedures are in progress, suspend a staff member with or without pay.

³² Refer to: Definitions; Appendix 2 Further Examples of Misconduct and Serious Misconduct

³³ Refer to: United Voice and Heritage Enterprise Agreement 2013

³⁴ Refer to: Employment and Staffing Policy and Procedures

³⁵ Refer to: Section: Suspension during Committee Review

Suspension During Management Committee Review

Suspension of a staff member without pay may occur while the Management Committee review takes place and if:

- The alleged Misconduct is of a nature that causes imminent and serious risk to the health or safety of a person; and/or
- The staff member's continued presence on Heritage grounds otherwise presents a serious risk to the Heritage community.

Where suspension occurs:

- The staff member may draw on accrued annual leave or long service leave entitlements. Any lost salary and other entitlements will be reimbursed if the allegation is dismissed.
- The staff member must not enter Heritage grounds without prior approval from the Director (or person acting in the Director's position).

Termination Following Management Committee Decision

- The Heritage Management Committee may proceed with termination of a staff member's employment on the basis of Serious Misconduct with or without notice.
- Notice of termination of a staff member's employment will be given as per the procedure above in Termination of Employment, and as required by law, effective from the date of the Committee's decision.³⁶

Contacting an Outside Agency

- If at any time a staff member is unhappy with the Committee's decision, it is their right to take the matter further.³⁷
- Heritage cannot dismiss employees in circumstances that are 'harsh, unjust or unreasonable'.³⁸

Reporting Obligations

- The Director (or Chair of the Management Committee/Human Resources Officer if the issue is with the Director) must assess all cases of staff Misconduct in consultation with the Management Committee, to determine if the Misconduct is deemed to constitute Criminal Conduct, a Notifiable Complaint, Reportable Conduct, Child Abuse/Neglect, Sexual Harassment, Discrimination or Workplace Bullying.³⁹
- If unsure whether a matter needs to be reported, the relevant authorities must be contacted for clarification.

Criminal Conduct

If Criminal Conduct is deemed to have occurred, the police must be informed in the first instance.⁴⁰

Notifiable Complaints

- The Management Committee (as of October 2017) is required to notify the ACT Regulatory Authority (CECA) allegations where:
 - A Serious Incident⁴¹ has occurred or is occurring or;
 - The National Law or National Regulations have been contravened.
- Minor allegations do not usually have to be reported to CECA, however if an allegation arises that is not reportable to CECA but does amount to Reportable Conduct (over-page), for example, a low-level crossing of professional boundaries, Heritage understands this must still be reported to the ACT Ombudsman.

³⁶ Refer to: United Voice and Heritage Enterprise Agreement 2013

³⁷ Refer to: Fair Work Australia: www.fairwork.gov.au.

³⁸ Refer to: Staff Complaints and Grievance Management Policy

³⁹ Refer to: Appendix 4: Definitions Relating to Reporting Obligations

⁴⁰ Refer to: <https://www.police.act.gov.au/> or 000 if imminent risk

⁴¹ Refer to: Appendix 4: National Regulation 12. Definition of Serious Incident

- Notifiable Complaints must be reported by the Management Committee to CECA within **24 hours** of the complaint being made.⁴² The notification must include:
 - Details of the event or incident.
 - The name of the person who initially made the grievance.
 - If appropriate, the name of the child concerned and the condition of the child, including a medical or incident report (where relevant).
 - Contact details of a nominated Grievances mediator/investigator.
 - Any other relevant information.
- Should a Complainant or Aggrieved Person report directly to CECA and CECA notifies Heritage, the Heritage Management Committee still has responsibility for investigating and dealing with the issue as outlined in this policy, in addition to co-operating with any investigation by CECA.

Reportable Conduct⁴³

Heritage is required to notify the ACT Ombudsman of allegations that any employee (including volunteers and others engaged to provide services to children) has engaged in conduct that results in:

- Ill treatment.
- Neglect or psychological harm to a child.
- Misconduct of a sexual nature.
- Criminal offences involving a child.⁴⁴

Reportable Conduct covers a broader range of conduct compared to the types of child abuse which must be reported to CECA and Child and Youth Protection Services.⁴⁵ For example, Heritage may become aware of an allegation or conviction that is reportable to the ACT Ombudsman but is not conduct which must be mandatorily reported to CECA or CYPS.

- The notification must be lodged as soon as possible, but no later than 30 days after Heritage becomes aware of the conduct.⁴⁶
- The scheme does not interfere with reporting obligations to ACT Policing, CECA or Child and Youth Protection Services (CYPS) or any other relevant professional bodies.
- Heritage is required to investigate any allegations of Reportable Conduct and provide a final report to the Ombudsman.

Where the same information is required by CECA and the ACT Ombudsman

- A copy of the CECA notification can be forwarded to the Ombudsman's office as a substitute for the required notification (s17G Notification).
- Where CECA investigates a Reportable Conduct matter, Heritage may decide not to investigate internally and may rely on the investigation conducted by CECA. In this circumstance, the findings of the CECA investigation can be provided by Heritage to the Ombudsman to meet reporting obligations under section 17J of the Ombudsman Act.

⁴² Notifiable Complaints must be submitted using the appropriate online form on the ACECQA website: http://files.acecqa.gov.au/files/ApplicationForm/Notification/NL01_NotificationOfComplaintsAndIncidents.pdf

⁴³ Refer to: Reportable Conduct Policy

⁴⁴ Refer to: Definitions

⁴⁵ Refer to: Reportable Conduct Policy

⁴⁶ Refer to: Reportable Conduct Policy

Child Abuse or Neglect ⁴⁷

- Prescribed matters requiring notification of the ACT Regulatory Authority include allegations that Physical and/or Sexual Abuse of a child has occurred, or is occurring, while a child is being educated and cared for at Heritage. CECA must be notified within **7 days** of the Management Committee becoming aware of the allegations.
- Where a Complaint involves a reasonable belief or suspicion that an enrolled child is at risk of Abuse or Neglect from an employee, educators are required to notify Child and Youth Protection Services without delay. ⁴⁸
- Where the alleged behaviour does not involve an employee (for example, the allegation is against a parent), there is no requirement to report to the ACT Ombudsman.

Staff Misconduct and Serious Misconduct - Reporting Obligations Summary

The Director, in consultation with the Committee must determine whether staff Misconduct constitutes Criminal Conduct, a Notifiable Complaint, Reportable Conduct or Child abuse/Neglect



Criminal Conduct Notifiable Complaint Reportable Conduct Child Abuse/Neglect



Report to the Police immediately
(Call 000 if imminent risk)



Report to the CECA within 24 hours
(CECA notification may be forwarded to Ombudsman).



Report to the ACT Ombudsman as soon as possible and within 30 days.



Report to CECA within 7 days and CYPS without delay.

Where Misconduct is deemed to constitute Workplace Bullying, Discrimination or Sexual Harassment ⁴⁹

The Director, in consultation with the Management Committee will consider contacting the Australian Human Rights Commission or Fair Work Australia for advice. ⁵⁰

Documenting Staff Underperformance and Misconduct

- Heritage will ensure that all instances of Underperformance, Misconduct and Serious Misconduct are documented, with notes made of all related discussions, by the staff member’s supervisor or the Director as appropriate and stored on the relevant staff member’s file and in the Warnings, Grievances and Issues Folder.
- All documentation relating to matters involving Underperformance, Misconduct and Serious Misconduct will be treated as confidential unless required to be disclosed under law ⁵¹ and kept in a confidential file. ⁵²

⁴⁷ Refer to: Child Protection Policy and Procedures

⁴⁸ Refer to: Child Concern Report at <https://form.act.gov.au/smartforms/csd/child-concern-report/>

⁴⁹ Refer to: Appendix 4: Definitions Relating to Reporting Obligations

⁵⁰ Refer to: Human Rights Commission at <http://www.humanrights.gov.au/employers/good-practice-good-business-factsheets/workplace-discrimination-harassment-and-bullying>

⁵¹ Refer to: Section: Reporting Obligations

Monitoring and Evaluating Staff Underperformance and Misconduct

- In order to assess whether the values and purposes of the Staff Underperformance and Misconduct Policy and Procedures has been achieved, the Management Committee will:
 - Revise the policy and procedures as part of the Heritage policy review cycle, and as required.
 - Keep this policy up to date with current legislation, early childhood education and care research and best practice guidelines from up to date sources and authorities.
 - Seek feedback from all stakeholders affected by the policy regarding its effectiveness.
 - Review the effectiveness of the policy and procedures to ensure that all cases have been dealt with in a fair and timely manner.
 - Monitor staff Underperformance and Misconduct as recorded in the Staff Warnings, Grievances and Issues Folder to assess whether satisfactory resolutions have been achieved.
 - Notify parents/guardians at least 14 days before making any changes to this policy or its procedures.
- When preparing the annual Quality Improvement Plan, the Staff Warnings, Grievances and Issues Folder may be used by the Director in consultation with the Management Committee to assess how to better manage staff development and performance and to meet the needs of children and families at the service.

Summary of Responsibilities

The Management Committee is Responsible for:

- Working with the Director, staff, students on placement, family volunteers, parents/guardians and other stakeholders at Heritage to create a culture that encourages positive, respectful, inclusive relationships and supports constructive feedback.⁵³
- Adhering to the professional standards set out for the Management Committee at all times.⁵⁴
- Ensuring that all children being educated and cared for at Heritage are protected from harm and any hazard likely to cause injury.⁵⁵
- Developing professional standards for educators and other staff in collaboration with the Director, educators, other staff and parents/guardians.⁵⁶
- Ensuring that all Heritage educators, staff, family volunteers, students on placement, parents/guardians and visitors are provided with a copy of the Heritage Code of Conduct (Ethics) on employment/enrolment at Heritage.⁵⁷
- Developing procedures to ensure staff, students on placement and family volunteers are not placed in situations where they are left out of sight and alone with a child.⁵⁸
- Activating the Staff Complaints and Grievances Policy and Procedures on notification of a breach of the Heritage Code of Conduct (Ethics).
- Following the procedures in this policy when notified of Staff Underperformance, Misconduct or Serious Misconduct.⁵⁹
- Contacting the police when notified of staff conduct involving criminal activity and calling 000 in an emergency situation where it is believed that there is an immediate risk (e.g. when violence has been threatened or perpetrated).

⁵² Refer to: Privacy and Confidentiality Policy and Procedures

⁵³ Refer to: Heritage Philosophy Statement; Heritage Code of Ethics

⁵⁴ Refer to: Heritage Constitution; Heritage Code of Ethics; Committee Handbook

⁵⁵ Refer to: Education and Care National Law, Section 167

⁵⁶ Refer to: Heritage Code of Ethics; Employment and Staffing Policy and Procedures; Educator Handbook

⁵⁷ Refer to: Educator Handbook; Policy Handbook; Heritage website - Members section

⁵⁸ Refer to: Child Protection Policy and Procedures

⁵⁹ Refer to: Section on Reporting Obligations

- Notifying the ACT Regulatory Authority (CECA) within 24 hours of a Serious Incident or Notifiable Complaint at the service.⁶⁰
- Notifying the ACT Ombudsman within 30 days of being notified of staff Misconduct which may constitute Reportable Conduct.⁶¹
- Notifying the ACT Regulatory Authority (CECA) within 7 days of being notified of staff Misconduct involving Child Abuse/Neglect, and Child and Youth Protection Service without delay.⁶²

The Nominated Supervisor is Responsible for:

- Working with the Management Committee, staff, students on placement, family volunteers, parents/guardians and other stakeholders at Heritage to provide an environment that encourages positive, respectful, inclusive relationships and interactions and supports constructive feedback.⁶³
- Adhering to the professional standards for educators and staff at all times.⁶⁴
- Assisting the Management Committee to develop professional standards for staff.
- Completing and signing the Code of Conduct (Ethics) Acknowledgement in the Educator Handbook.
- Understanding that serious breaches of the Code of Conduct (Ethics) will be deemed to be Misconduct and may lead to disciplinary or legal action, or a review of their engagement.
- Ensuring all educators sign the Educator Handbook including the Code of Conduct (Ethics) Acknowledgement on employment and that this is filed with individual staff records.
- Ensuring that the children educated and cared for at Heritage are protected from harm and from any hazard likely to cause injury.⁶⁵
- Informing the Management Committee of a breach of the Heritage Code of Conduct (Ethics).
- Informing the Management Committee in the event of staff Misconduct which may constitute criminal conduct, Reportable Conduct, a Notifiable Complaint or child abuse/neglect.⁶⁶
- Contacting the police via 000 in an emergency situation where it is believed that there is an immediate risk (e.g. when violence has been threatened or perpetrated).
- Developing procedures to ensure that staff, students and family helpers are not left out of sight and alone with a child.⁶⁷

Educators and all other Staff are Responsible for:

- Completing and signing the Code of Conduct (Ethics) Acknowledgement in Educator Handbook.
- Adhering to the Code of Conduct (Ethics) for staff at all times.
- Providing guidance to parents/guardians and volunteers through positive role modelling and, when appropriate, clear and respectful directions.
- Working with the Management Committee, Director, other staff, students on placement, parents/guardians and others at the service to provide an environment that encourages positive, respectful, inclusive relationships and supports constructive feedback.⁶⁸
- Ensuring that family volunteers are not left alone and out of sight with a child unless they are the child's parent.⁶⁹

⁶⁰ Refer to: Section on Reporting Obligations

⁶¹ Refer to: Section on Reporting Obligations

⁶² Refer to: Section on Reporting Obligations

⁶³ Refer to: Heritage Philosophy Statement

⁶⁴ Refer to: Heritage Code of Conduct (Ethics); Educator Handbook

⁶⁵ Refer to: National Law: Section 167

⁶⁶ Refer to: Section on Reporting Obligations

⁶⁷ Refer to: Child Protection Policy and Procedures

⁶⁸ Refer to: Heritage Philosophy Statement; Heritage Code of Conduct (Ethics)

⁶⁹ Refer to: Child Protection Policy and Procedures

- Informing the Director in the event of a Serious Incident or Notifiable Complaint.⁷⁰
- Understanding and accepting that serious breaches of the Code of Ethics will be deemed Misconduct and may lead to disciplinary or legal action, or a review of their engagement.

Parents/guardians are responsible for:

- Reading and adhering to the Heritage Code of Ethics.
- Abiding by the law.
- Reading the Family Handbook and abiding by the standards of conduct as set out in all Heritage policies, procedures and practices.⁷¹

Related Policies and Documents

Name	Location
Behaviour Guidance Policy and Procedures	Policy Handbook, Family Handbook and Committee Handbook - available on Heritage website, Members' Section.
Child Protection Policy and Procedures	
Complaints and Grievance Management (non-staff) Policy and Procedures	
Code of Conduct (Ethics) Policy	
Creating Inclusion and Equity Policy and Procedures	
Employment and Staffing Policy and Procedures	Policy and Procedures Manuals in Main Office, Foyer and Staff Programming Room
Heritage Philosophy Statement	
Non-Compliance Policy and Procedures	
Privacy and Confidentiality Policy and Procedures	
Reportable Conduct Policy	
Staff Complaints and Grievance Management Policy and Procedures	
United Voice and Heritage Enterprise Agreement 2013	
Work Health and Safety Policy and Procedures	Educator and Relief Educator Handbooks

References and Further Reading

Australian Children's Education and Care Quality Authority (ACECQA). (2017). *Guide to the Education and Care Services National Law and the Education and Care Services National Regulations 2011.* <http://files.acecqa.gov.au/files/National-Quality-Framework-Resources-Kit/NQF-Resource-02-Guide-to-ECS-Law-Regs.pdf>

Australian Children's Education and Care Quality Authority (ACECQA) (2018). *Guide to the National Quality Framework.* <http://files.acecqa.gov.au/files/NQF/Guide-to-the-NQF-180118.pdf>

ACT Ombudsman (2017). *Reportable Conduct Scheme Resource Kit.*

<http://www.ombudsman.act.gov.au/reportable-conduct-scheme/resource-kit>

Australian Human Rights Commission (2014). *Workplace discrimination, harassment and bullying.* <http://www.humanrights.gov.au/employers/good-practice-good-business-factsheets/workplace-discrimination-harassment-and-bullying>

The Australian National University (ANU). (2016). *Unsatisfactory Performance and Misconduct Policy.* https://policies.anu.edu.au/ppl/document/ANUP_000477

The Australian National University (ANU). (2016). *Managing Unsatisfactory Performance Procedure.* https://policies.anu.edu.au/ppl/document/ANUP_000507

⁷⁰ Refer to: Appendix 4: Definitions Relating to Reporting Obligations

⁷¹ Refer to: Policy Handbook; Family Handbook; Non-Compliance Policy and Procedures



The Australian National University (ANU). (2016). *Managing Misconduct, Serious Misconduct and Suspension Procedure*. https://policies.anu.edu.au/ppl/document/ANUP_000506

Fair Work Australia (2017). *Help Resolving Workplace Issues*.

<https://www.fairwork.gov.au/how-we-will-help/how-we-help-you/help-resolving-workplace-issues>

Fair Work Ombudsman (2013). *Best Practice Guide: Managing Underperformance*.

<https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/best-practice-guides/managing-underperformance>

Fair Work Ombudsman (2018). *Templates and Guides: Managing Underperformance*.

<https://www.fairwork.gov.au/how-we-will-help/templates-and-guides>

Fair Work Ombudsman Online Learning Centre (2018).

<http://fairwork.cls.janison.com/Auth/Login?ReturnUrl=/>

Fair Work Commission (2017). *Anti-Bullying*. <https://www.fwc.gov.au/disputes-at-work/anti-bullying>

University of Melbourne Early Learning Centre. (2014). *Code of Conduct Policy*

University of Melbourne Early Learning Centre. (2014). *Staffing Policy*

University Preschool and Childcare Centre. (2016). *Complaints Policy and Grievance*

Procedure. <https://www.upccc.com.au/wp-content/uploads/2017/01/COMPLPOL-23-06-16.pdf>

Useful Websites

Australian Children's Education and Care Quality Authority - <http://files.acecqa.gov.au>

ACT Ombudsman - <http://www.ombudsman.act.gov.au/>

Commonwealth Ombudsman - <http://www.ombudsman.gov.au>

Australian Human Rights Commission - <http://www.humanrights.gov.au>

FairWork Ombudsman - <www.fairwork.gov.au>

Fair Work Commission - <https://www.fwc.gov.au/>

Version Control and Change History

Version Number	Approval Date	Approved by	Author and Amendments
1	10 Sept 2008	HECC Management Committee	Adopted and amended the ANU's Staff Underperformance and Misconduct Policy Added an Appendix of specific examples of incidents and their consequences.
2	November 2012	HECC Management Committee	Author: Julia Charters Added statements about principles of procedural fairness and standards of proof to introduction. Added that staff members have the right to choose to be assisted by a staff representative when developing a Performance Agreement. Included details on the investigation process including interviewing relevant persons and gathering and assessing documents.

3	17 June 2018	HECC Management Committee	<p>Author: Julia Charters.</p> <p>Updated References, Rationale and Definitions. Added Contents Page and Summary or Responsibilities. Updated policy format to utilise Footnotes for referring to additional information.</p> <p>Added Section on Reporting Obligations to CECA, CYPS, and ACT Ombudsman under new ACT Reportable Conduct Scheme. Added Reporting Obligations Summary Chart.</p> <p>Updated Policy Statement and procedures to reflect updates to National Regulations, Quality Standards and Reporting Obligations. Updated and expanded procedures to reflect FairWork Ombudsman’s Best Practice Guide for Managing Underperformance including General Guidelines for Discussing Underperformance.</p> <p>Added Appendices: Appendix 1: Identifying Common Underperformance Issues. (Fair Work Ombudsman) Appendix 3: Checklist for Managing Underperformance Issues. (Fair Work Ombudsman) Appendix 4: Relevant National Law, National Regulations and Quality Standards</p>
4	26 July	Director	<p>Amended procedure for terminating employment to require that it is done in person and not by text, email or phone, unless there are extenuating circumstance. This follows a recent decision by the Human Rights Commission that the termination of employment is a matter of such significance that basic human dignity requires that dismissal be conveyed personally with arrangements for the presence of a support person and documentary confirmation. And that only very rarely may there be exceptions.</p>



Appendix 1: Identifying Common Under-Performance Issues

Issue	Possible Causes	Actions
<p>Staff member does not undertake work as required, showing signs of apathy and laziness</p> <p>Staff member does not appear to understand job requirements or directions</p>	<p>Job Content and Design</p> <p>Inappropriate Job Fit</p> <p>Personal or External Issues</p>	<p>Begin with informal performance discussion</p> <p>Be clear about the performance requirements and expected contribution of the role to the service</p> <p>Focus on interest in work tasks and how they might be improved</p> <p>Explore options for opportunities in other areas of service, if possible</p> <p>Refer to counselling service if personal circumstances are impacting performance</p>
<p>Staff member does not follow directions or perform tasks as required</p>	<p>Failure to understand what is required</p> <p>Inability to perform tasks</p> <p>Personal Issues</p>	<p>Begin performance improvement process starting with informal discussion around what is required in the position.</p> <p>Look at possible options for training and development if a skill deficit is identified.</p> <p>Commence formal performance management process if no improvement is forthcoming</p>
<p>Staff member fails to acknowledge they are underperforming</p>	<p>Performance Issues have not been adequately explained</p> <p>Process has not been adequately applied</p> <p>Employee does not accept management assessments</p>	<p>Re-establish expected outcomes – use evidence of how performance has failed to meet expected standards and explain the impact of this on the quality/success of the service</p> <p>If necessary, commence formal performance management process</p>
<p>Staff member does not complete work tasks to required standard</p>	<p>Lacks the required skills and capabilities</p>	<p>Identify training and development opportunities as part of the performance improvement plan</p> <p>If employee fails to develop required skills, progress to performance management process to possible options such as reassignment of duties or transfer to other areas to achieve a better job fit, if possible.</p> <p>Review recruitment practices to ensure appropriate selection decisions are being made</p>
<p>Staff member is cynical of work environment and tasks, bringing negative opinions to work environment</p>	<p>Has become disillusioned with work environment</p> <p>Fails to understand value of work being undertaken</p>	<p>Establish team culture based on respect and support</p> <p>Re-establish role of the position, and the value of outcomes delivered by the service</p> <p>If possible, explore opportunities for career transition and movement</p>
<p>Staff member is regularly absent without cause</p>	<p>Job content/design</p> <p>Inappropriate job fit</p> <p>Management Style</p> <p>Personal or workplace issues</p>	<p>Identify cause behind absenteeism</p> <p>Explore possible strategies for job re-design, changes to work environment, management of health issues</p> <p>Re-establish expectations of attendance</p>

Adapted from: Fair Work Ombudsman: Managing Underperformance Best Practice Guide 2013



Appendix 2: Further Examples of Misconduct and Serious Misconduct

Misconduct

Behaviour that constitutes Misconduct:

- Failure to comply with time recording procedures.
- Wasting time or another employee's time to the detriment of children or other educators.
- Acts of negligence which adversely affect hygiene, quality or safety of children or staff.
- Failure to observe established safety rules.
- Failure to report all work-related accidents to the Director or Room Leader.
- Failure to comply with medication and medication signature requirements.
- Using abusive, foul or threatening language on Heritage premises or while on any Heritage business.
- Behaviour which could result in either the injury of a child, a staff member or damage to Heritage or personal property.
- Unauthorised absence from duties.
- Failing to report lateness or absence from work to the Director.
- Continual lateness or absences from work.
- Smoking inside Heritage premises or in other than designated areas.
- Sleeping during work hours.
- Failure to maintain reasonable standards of personal hygiene.
- Failure to wear clothing or footwear suitable for the professional care of children.
- Harassment or bullying of staff or children.
- Racial or sexual comments.
- Use of mobile phone while supervising children.

Serious Misconduct

Behaviour that constitutes Serious Misconduct for which the disciplinary action is instant dismissal:

- Falsification of company records, including falsifying time sheets.
- Refusal to obey a lawful order or walking off the job.
- Physical violence against anyone on Heritage premises, including smacking.
- Acts of negligence which seriously affect quality of care or safety of the children, staff or Heritage.
- Bringing liquor into Heritage premises or consuming liquor anywhere on those premises without the authorisation of management.
- Bringing drugs into Heritage, being in possession of or using drugs while at work, or under the influence of drugs at work, other than those prescribed by a medical practitioner.
- Misuse of medicines.
- Unauthorised possession of company property or another employee's property.
- Intentionally leaving children unsupervised.
- Repeated harassment or bullying of staff or children.
- Racial or sexual discrimination.
- Denigration of Heritage, the staff or parents to other staff, parents or the general public.

Appendix 3: Checklist for Formally Managing Underperformance

Checklist	Tick
Ensure staff member clearly understand what is expected of them	
Clearly identify and assess the problem	
Organise a meeting with the staff member to discuss the problem	
Give the staff member time to prepare for the meeting	
Allow the staff member to bring a support person to the meeting	
Conduct the meeting in a private, non-threatening comfortable and quiet location	
Define and explain your concerns to the staff member in specific terms	
Give the staff member a genuine opportunity to respond before considering your actions	
Where a staff member’s performance is suffering due to the employee’s personal circumstances, refer the employee to professional help or counselling	
Clearly outline the improvement required and the consequences of continued poor performance	
Devise a solution with the staff member to improve performance	
Develop an action plan which includes performance improvement milestones and timeframes for further review	
Schedule further meetings to review the staff member’s performance against the agreed action plan	
Document all discussions, including actions to be taken	
Monitor the staff member’s performance and continue to provide feedback	
Follow any steps set out in an applicable industrial instrument (such as a modern award or enterprise agreement), the service policies and procedures and the staff member’s employment contract concerning performance management.	

Adapted from: Fair Work Ombudsman 2013

Appendix 4: Relevant National Law, National Regulations and Quality Standards**Relevant National Law and Regulations (as per October 2017 update)**National Law Section 166: Offence to use inappropriate discipline

- (1) The approved provider of an education and care service must ensure that no child being educated and cared for by the service is subjected to-
 - (a) Any form of corporal punishment; or
 - (b) Any discipline that is unreasonable in the circumstances.
- (2) The nominated supervisor of an education and care service must ensure that no child being educated and cared for by the service is subjected to-
 - (a) Any form of corporal punishment; or
 - (b) Any discipline that is unreasonable in the circumstances.
- (3) A staff member of, or a volunteer at, an education and care service must not subject any child being educated and cared for by the service to-
 - (a) Any form of corporal punishment; or
 - (b) Any discipline that is unreasonable in the circumstances.

National Law Section 167: Offence relating to protection of children from harm and hazards

- (1) The approved provider of an education and care service must ensure that every reasonable precaution is taken to protect children being educated and cared for by the service from harm and from any hazard likely to cause injury.
- (2) A nominated supervisor of an education and care service must ensure that every reasonable precaution is taken to protect children being educated and cared for by the service from harm and from any hazard likely to cause injury.

National Law: Section 174: Offence to fail to notify certain information to Regulatory Authority

- (2) An approved provider must notify the Regulatory Authority of the following information in relation to an approved education and care service operated by the approved provider--
 - (a) any serious incident at the approved education and care service;
 - (b) any complaints alleging--
 - (i) that a serious incident has occurred or is occurring while a child was or is being educated and cared for by the approved education and care service; or
 - (ii) that this Law has been contravened;
 - (c) information in respect of any other prescribed matters.

Regulation 168: Education and care service must have policies and procedures

- (1) The approved provider of an education and care service must ensure that the service has in place policies and procedures in relation to the matters set out in sub regulation (2).
- (2) Policies and procedures are required in relation to the following—
 - (i) Staffing, including—
 - (i) A code of conduct for staff members; and
 - (j) Interactions with children, including the matters set out in regulations 155 and 156;

Regulation 84: Awareness of Child Protection Law

The Approved Provider of an education and care service must ensure that the Nominated Supervisor and staff members at the service who work with children are advised of—

- (a) The existence and application of the current child protection law; and
- (b) Any obligations that they may have under that law.

Regulation 155: Interactions with children

An approved provider must take reasonable steps to ensure that the education and care service provides education and care to children in a way that—

- (c) Maintains at all times the dignity and rights of each child.

Regulation 175 (2)(e)

Allegations that physical or sexual abuse of a child or children has occurred or is occurring while the child or children are being educated and cared for by the education and care service must be reported to the Regulatory Authority by the Approved Provider within 7 days of the incident or the provider becoming aware of the incident.



National Regulation 176: Time to notify certain information to Regulatory Authority

(2) For the purposes of section 174(4) of the Law, a notice must be provided-

- (a) In the case of a notice under section 174(2)(a)-
 - (i) In the case of the death of a child, as soon as practicable but within 24 hours of the death, or the time that the person becomes aware of the death; and
 - (ii) In the case of any other serious incident, within 24 hours of the incident or the time that the person becomes aware of the incident.
- (b) In case of a notice under section 174(2)(b) or a notice of a matter referred to in regulation 175(2)(b), within 24 hours of the complaint or incident.

National Regulation 12: Meaning of serious incident (as of February 2018 update)

For the purposes of the definition of serious incident in section 5(1) of the Law, each of the following is prescribed as a serious incident—

- (a) the death of a child—
 - (i) while that child is being educated and cared for by an education and care service;or
 - (ii) following an incident occurring while that child was being educated and cared for by an education and care service;
- (b) any incident involving serious injury or trauma to a child occurring while that child is being educated and cared for by an education and care service—
 - (i) which a reasonable person would consider required urgent medical attention from a registered medical practitioner; or
 - (ii) for which the child attended, or ought reasonably to have attended, a hospital;

Example. A broken limb.

- (c) any incident involving serious illness of a child occurring while that child is being educated and cared for by an education and care service for which the child attended, or ought reasonably to have attended, a hospital;

Example. Severe asthma attack, seizure or anaphylaxis reaction.

- (d) any emergency for which emergency services attended;
- (e) any circumstance where a child being educated and cared for by an education and care service—
 - (i) appears to be missing or cannot be accounted for; or
 - (ii) appears to have been taken or removed from the education and care service premises in a manner that contravenes these Regulations; or
 - (iii) is mistakenly locked in or locked out of the education and care service premises or any part of the premises.

Relevant National Quality Standard areas (as per updated NQS, Feb. 2018)

Quality Area 2: Children's Health and Safety

Standard 2.2 Concept: Safety. Descriptor: Each child is protected.

Element 2.2.1 Concept: Supervision. Descriptor: At all times, reasonable precautions and adequate supervision ensure children are protected from harm and hazard.

Standard 2.3 Concept: Child protection. Descriptor: Management, educators and staff are aware of their roles and responsibilities to identify and respond to every child at risk of abuse and neglect.

Quality Area 4: Staffing Arrangements

Standard 4.2 Concept: Professionalism. Descriptor: Management, educators, and staff are collaborative, respectful and ethical.

Element 4.2.2 Concept: Professional standards. Descriptor: Professional standards guide practice, interactions and relationships.

Quality Area 5: Relationships with Children

Standard 5.1 Concept: Relationships between educators and children. Descriptor: Respectful and equitable relationships are developed and maintained with each child.



Element 5.1.1 Concept: Positive educator to child interactions. Descriptor: Responsive and meaningful interactions build trusting relationships which engage and support each child to feel secure, confident and included.

Element 5.1.2 Concept: Dignity and rights of the child. Descriptor: The dignity and rights of every child are maintained.

Quality Area 6: Collaborative partnerships with families and communities

Standard 6.2 Concept: Collaborative partnerships. Descriptor: partnerships enhance children's inclusion, learning and wellbeing.

Quality Area 7: Governance and Leadership

Standard 7.1 Concept: Governance. Descriptor: Governance supports the operation of a quality service.

Element 7.1.1 Service philosophy and purpose - A statement of philosophy guides all aspects of the service's operations.

Element 7.1.3 Roles and responsibilities - Roles and responsibilities are clearly defined, and understood, and support effective decision-making and operation of the service.

Standard 7.2 Leadership - Effective leadership builds and promotes a positive organisational culture and professional learning community.

Element 7.2.3 Development of professionals - Educators, co-ordinators and staff members' performance is regularly evaluated, and individual plans are in place to support learning and development.