



# COUNSELLING FOR BETTER WORK PERFORMANCE

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A JOINT PSMPC/COMCARE PUBLICATION



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## FOREWORD

*T*he Government is committed to building a high performance public service. The *Public Service Act 1999* sets out the APS Values and the APS Code of Conduct which require APS staff to behave at all times in a way that upholds the Values.

In giving effect to the Value *The APS focuses on achieving results and managing performance* agencies need to develop a strong performance culture and continuously find better ways of achieving their goals. Chapter 2.12 of the Public Service Commissioner's Directions 1999 sets out the responsibilities of Agency Heads and APS employees. To achieve maximum performance, agencies must ensure that organisational values are communicated to staff and are integrated into day to day operations.

Much of the responsibility for managing for enhanced performance rests with managers; it is therefore imperative that they are skilled and confident in providing feedback to staff on their standard of work and conduct. Whenever problems develop, feedback and counselling are essential parts of managing for success, yet receiving feedback on poor work performance or being counselled about work or conduct can lead to occupational stress, lowered morale etc. Managers need to be aware of the possible consequences when they undertake appraisal or counselling and to apply the principles of occupational health and safety and of people management when dealing with their staff.

This booklet provides some advice on providing feedback and counselling so that managers might best achieve their purpose in that interaction with staff.



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December 2000



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December 2000





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# INTRODUCTION

**T**his document is intended to provide managers across the APS with an outline of their responsibilities, and with advice about best practice in relation to work performance counselling, including strategies to reduce the likelihood of people experiencing a stress response as a result of counselling.

The document deals primarily with performance counselling as a ‘formal’ process in relation to assessment and monitoring of an individual’s work performance, but also contains advice on how to provide effective feedback as an ‘informal’ process.

The term ‘counselling’ is used in the sense of assisting people to achieve and maintain a satisfactory standard of work performance and should not be confused with the type of counselling provided by professionally qualified counsellors. Managers are not expected to be psychologists and they should not try to solve difficult personal problems which their people may experience.

Employee Assistance Programs and staff counsellors have the skills to deal with such problems and managers should make use of these resources where appropriate.

# PERFORMANCE MANAGEMENT AND THE RESPONSIBILITIES OF MANAGERS

*P*erformance management, in the context of people management, is about helping people to work more effectively and, by improving individual and team performance, increasing the overall effectiveness and productivity of your agency.

Effective managers are good people managers. It is your responsibility to foster a workplace culture in which people can maximise and maintain their level of work performance. To do so, it is essential that you establish clear communication with your staff; counselling and feedback are two very important tools that you can use in that process.

As a manager, it is your responsibility to continually monitor the way your staff are performing and provide them with appropriate guidance and support. It is easy to take good work for granted and only provide negative feedback when something goes wrong. But if people are to feel that their work has value, their achievements must also be acknowledged. Regular, positive feedback can be a powerful tool to motivate and enhance the performance of your staff.

The following checklist gives important characteristics of effective performance management.

- Managers provide leadership and integrate performance management with other aspects of their work in managing people.
- People understand that their performance directly contributes to the ongoing success and viability of their agency.
- Individual and team responsibilities and their performance are clearly linked to the attainment of program and corporate goals and the needs of clients.
- Individuals and teams have a clear understanding of their work responsibilities and the standards of work expected of them.
- Individuals and teams meet the standards of behaviour expected of public servants.
- Managers monitor and assess the performance of their people.
- Individuals and teams receive regular feedback on their performance against program and corporate goals.
- Managers make use of the potential of all their people and develop their skills in encouraging individual career planning.
- Improved and valued performance is recognised and rewarded.
- Managers seek to improve poor performance and address continuing poor performance.





# FEEDBACK AND COUNSELLING

The purpose of both counselling and feedback is to provide your staff with the information, advice and assistance they need to contribute fully to the achievement of your organisation's objectives and, where a person fails to make the required contribution, to demonstrate that you have made an appropriate effort to assist them.

Many situations involve a combination of feedback and counselling, or a progression from feedback to counselling. For example, when assessing how a probationer is performing, you are expected to provide feedback. If, however, despite having given the probationer an appropriate level of advice and assistance, you identify a problem with their work performance or conduct, you may also need to initiate counselling.

The following are particular situations where counselling and/or feedback may be appropriate:

- as part of a regular system of performance feedback;
- assessing the performance of a probationer;
- in the context of performance appraisal;
- assessing staff training and development needs;
- in connection with a referee's report;
- after a selection process;
- if a person is planning to retire or resign from the service;
- where there is a decline in work performance;
- where the standard of conduct is not being met;
- where there has been particularly good performance;
- where a difficulty has been overcome; or
- to maintain continuing good performance.





# FEEDBACK

**F**eedback is generally informal and involves you and your staff member exchanging information in a broad range of situations about how you can best work together to achieve the goals of your organisation. Feedback requires you to communicate clearly to the person what is expected in terms of work performance and conduct and regularly inform them of the extent to which they are meeting those expectations. Feedback ranges from oral comments on a person's performance to written reports, such as probation, performance appraisal or referee reports.

## FEEDBACK SHOULD BE A TWO-WAY PROCESS

It is important for feedback to be a two-way process. Firstly, a feedback discussion should also give a staff member the opportunity to express his or her views on your performance. You need to receive 'upwards' feedback from your staff in order to accurately gauge how well you are fulfilling your own responsibilities. By giving consideration to upwards feedback you can reinforce the message that individual contributions to team performance are taken seriously. Secondly, if you have a concern about a person's work performance it is usually more effective to work with the person to develop a solution rather than attempt to impose one from above. A co-operative, corrective approach will frequently achieve the best result. If feedback is balanced and constructive, your staff are more likely to respond to concerns about their performance with an effort to improve.

## PROVIDING EFFECTIVE FEEDBACK

To be fully effective, feedback should be:

- based on open, two-way communication;
- timely and regular;
- factual and specific;
- understood;
- honest;
- constructive; and
- followed up.

### Timely and regular

Feedback is more effective if given on a regular, continuing basis. It need not, and should not, be limited to structured processes. Any concerns you have about a person's performance or conduct should be addressed promptly. Early intervention can often prevent more serious problems developing. Similarly, good performance should be promptly recognised.

## Factual and specific

You should focus on measurable performance. Avoid making unsubstantiated judgements. Give tangible, specific examples whenever possible rather than generalising. You should also ensure that any information that you provide, e.g. concerning entitlements, is accurate.

## Understood

Your staff need to understand why you are giving them feedback: that their individual performance is linked to the achievement of corporate objectives. It is also important, if you identify an aspect of a person's performance that requires improvement, that you make the person clearly aware of the established standards and in what way you consider that they are not being met. When you talk to staff about their performance you should clearly articulate your reasons for doing so and outline possible action that may result if there is no improvement. Problems may arise if managers and staff place differing interpretations on a discussion. In some cases a manager may feel that he or she has counselled a person while that person is under the impression that nothing more than a routine discussion has taken place.

Inform the staff member prior to any discussion as to what issues you wish to discuss with them and give them an opportunity to discuss them immediately or make another time (although you should not allow the discussion to be deferred for an unreasonable period).

## Constructive

You should be honest, but not coercive or offensive. Frame the discussion around ways to improve performance rather than focusing solely on problems or perceived shortcomings. In many cases, even when a person is experiencing performance problems, there will be particular tasks which they still perform well. If you open the discussion by touching upon these positives, and then move on to the areas which require improvement, frequently a more constructive outcome can be achieved.

## Follow up

Little will be achieved if feedback is not followed up. You need continually to monitor and evaluate the performance of your staff. When, following a feedback discussion, you agree on a course of action to improve a person's performance, e.g. to investigate the possibility of providing training or developmental opportunities, it is important that you follow up your commitment. It is equally important for staff to be committed to improvement and to follow up the actions to which they have agreed.

## Be positive

Some managers may tend to focus on the negative aspects of feedback. While it is important to encourage improved performance in those not functioning to the required standard, you should try to adopt a balanced approach by also recognising and rewarding good performance.

Formal performance appraisal schemes provide an opportunity to recognise and reward good performance. There are many other informal opportunities, such as annotating a person's work with positive comments, especially if those comments will be seen by senior management; taking a few moments at a meeting to acknowledge someone's good work; allowing an individual to take on more challenging and responsible tasks; or praising good work in the presence of senior management.

### Motivate

Motivating your staff is an essential part of the job of managing people in the APS environment. Recognition can be an important element of motivation. How a person performs in the future will often be influenced by feedback on the way in which they have performed in the past. By acknowledging the achievements of your staff, and ensuring that they have as much information as possible about the work they do and what is required to do it better, you should be able to increase their motivation to perform well.

### Develop

Regular discussions with your staff will enable you to assist them to identify any training they may require to improve their work performance and will also provide you with the opportunity to assist in their career development. A personal development plan can be a useful tool to help your staff to develop realistic training and development goals.

### Participate

Performance problems can sometimes result from factors other than the capacity or willingness of staff. Limited resources, inappropriate job design and inefficient or outmoded procedures are among a range of things that may contribute to poor performance. Regular discussions with your staff will give them the opportunity to bring such factors to your attention, and they are likely to be more willing to accept the measures taken to address such problems if they have been able to participate in developing the solutions.

It is important for managers and employees to understand each other's needs. You should establish what your staff need to do their jobs more efficiently and your staff need to fully understand your requirements. A needs-based approach should help you to establish effective communication and thereby improve performance in your workplace.





# COUNSELLING

Counselling is a formal process, initiated when a person has not responded to advice and assistance you have provided on a less formal basis, and will usually involve your taking the following steps:

- advise the person in advance that a discussion about his or her work performance or conduct is to be held at a given time and place, with sufficient notice to enable you both to come to the discussion prepared;
- arrange for the meeting to be held in private, although a support person for the person being counselled may be present, as well as someone you may have asked to attend as an observer; and
- keep a brief record of the meeting—this could be a diary note.

A counselling checklist is included at Appendix A.

## WHEN TO COUNSEL

Determining at what point a decline in work performance or a failure to observe the appropriate standard of conduct warrants formal counselling is a matter for your judgement. It is not always easy to decide when to move from providing informal comments on a person's work to a more formal approach. However, when you do decide to take that step, make sure that you begin documenting the steps you are taking to address the situation (see *Recording the discussion* below).

By intervening at an early stage you can often prevent a problem escalating and requiring more serious and possibly disruptive action further down the track.

If you encourage a free flow of information in the workplace and open, two-way communication is the norm, it will be easier for you to identify performance problems when and if they do arise, and deal with them promptly. A good management style will not eliminate performance problems, but good workplace communication should help you to identify some problems early, so you can do something about them.

## WHO SHOULD GIVE THE COUNSELLING?

In most cases it is your responsibility as a manager to provide counselling to your staff in relation to work performance and conduct. However, in circumstances where performance is affected by factors outside the workplace, for example if a person has a problem with drugs or alcohol or has difficulties in their private life, it may be appropriate, after an initial discussion, to refer the person to a staff counsellor or counsellor from an Employee Assistance Program (EAP). This does not mean that you should back away from the problem, but you should focus on ways to improve the person's performance at work and not attempt to solve problems that may be occurring in the individual's private life. In most cases, managers are not qualified to take on such a role.

Apart from providing a counselling service for staff, EAPs can also help you as a manager. For instance, if you are faced with having to give a person critical feedback about their performance and you feel uncertain about your approach, you may wish to contact the EAP to obtain advice on how to best frame the discussion. You may also wish to consult a more senior manager or contact your human resources area for advice.

In some cases it may be appropriate to involve a professionally qualified counsellor outside your agency, such as a medical practitioner. If you are considering an external referral you should not put pressure on the person to seek outside counselling. A referral should be arranged only with the person's consent.

### WHERE SHOULD YOU COUNSEL AND WHO SHOULD BE PRESENT?

Generally, people should be praised in public and criticised in private. However, some people may be embarrassed by unexpected public praise, and so you need to be aware of this and use your own judgement when delivering positive feedback. It is advisable first to let a person know they have done a good job and then, for example, to tell them that you intend to mention this at the next meeting.

Where formal counselling is to be done, the discussion should ideally be held in a place which is private and free from distractions. Your office, if you have one, may be appropriate but, in some situations, a more neutral meeting place away from the immediate work area may be preferable. Where possible, a suitable time for the discussion should be agreed in advance and sufficient notice given to allow both yourself and the staff member to prepare adequately.

While it is desirable for a person to be given sufficient notice to prepare for a counselling session, there may be occasions when you decide that a person's behaviour warrants immediate action, particularly when the behaviour is causing disruption to other staff.

A counselling discussion usually involves a manager or supervisor and a staff member but, in some situations, you may find that a person requests the presence of a support person or independent observer. You may also wish to have an observer present. A person or persons attending a session in this capacity would not normally take part in the discussion and their presence and role should be clarified before the session commences.

### THE IMPORTANCE OF AGREED OUTCOMES

To achieve the best results, counselling, like feedback, should be based on open, two-way communication. You should work with a person to generate an agreed plan of action, establishing and articulating the needs of both the manager and the staff member. Focus on future outcomes rather than dwelling too much on what has happened in the past. Your aim is to produce an improvement in the person's performance or conduct and for this to happen you should, first, agree that an improvement is required and, secondly, agree on the steps which should be taken to achieve it. It is also important that you establish a time frame to achieve your agreed goals and to review the success of your strategy.

## RECORDING THE DISCUSSION

The keeping of APS records, including counselling records, is covered by the Information Privacy Principles (IPPs) contained in the *Privacy Act 1988* and by the *Archives Act 1983*. These Acts cover the way in which personal information is collected and stored, how it is used and to whom it should be disclosed. It is particularly important to make sure you only record personal information about someone that is relevant to the purpose for which you are collecting the information, and that you clearly inform the person why you are making a record and who else will see it. More information about the IPPs can be obtained from the Office of the Privacy Commissioner (or call their inquiry hotline: 1800 023 985). The IPPs can also be accessed on the Privacy Commissioner's Home Page at (<http://www.hreoc.gov.au/privacy/ipp's.htm>).

If you initiate a counselling session in relation to underperformance or conduct you should keep a formal record as evidence for both parties of what has occurred and as a basis for future action (e.g. training and development). The record would also show that counselling has taken place, in case a formal process, such as the agency's procedures for poor performance, is later commenced.

You should make the record as soon as possible after the meeting, while your recollection of the events is still fresh. It will depend on the seriousness of the situation under discussion how much detail you record, but you should include relevant facts, such as the names of the people present, the date and location, the reason for the discussion and the main points covered, including the positives, and any agreed actions or outcomes, including time frames. You should not include unnecessary details about a person's private life. Recording information which is not relevant to the purpose may mean that you are in breach of the Privacy Act.

Both you and the person being counselled should sign the record, unless the person believes that the record is not an accurate reflection of the discussion, in which case he or she may attach their own signed version of the meeting. If other people are present as observers you should also ask them to sign.

### Disclosure

You should inform the person that you have made a record, for what purpose, and who will have access to it. You are then responsible for storing the record securely, using an in-confidence file, and preventing any unauthorised access.

Matters raised in a counselling discussion should be treated confidentially, and disclosed to third parties only in line with the relevant Information Privacy Principles. You should generally inform a person if you are disclosing or referring a record of counselling to a third party, except where this is for a routine purpose, explained to the person at the time of the counselling.

### Storage of records

If you consider that a formal process, such as misconduct or underperformance, may be necessary, you may need to pass counselling records to your agency's human resources area. If, while you are reviewing a person's conduct or work performance,

the responsibility for their supervision passes to another manager, it will usually be appropriate to pass on your records. This is particularly important in cases involving misconduct or underperformance as in these cases there is a need to establish clearly what counselling and feedback have taken place. The processes can be unnecessarily prolonged if changes in supervision result in a lack of continuity in the recording of such action.

Australian Archives' *Administrative Functions Disposal Authority*, produced in February 2000, provides that two years after the date of last action, agencies may destroy records for personal counselling, new entry counselling, career counselling, work performance counselling or counselling in relation to minor conduct issues. Good practice suggests that such records should be destroyed at the end of the two years unless further counselling or other action on the issue in question is required during that period. Where a record of counselling is placed on a personal file, e.g. if it relates to possible misconduct action, underperformance (including while on probation), the record should be retained as a basis for further action and to allow for periods of review. You should be aware that any records of counselling that you create may be required to be produced in legal proceedings.

#### WHAT ARE THE OPTIONS IF COUNSELLING DOESN'T ACHIEVE THE EXPECTED OUTCOME?

The expected outcome of counselling is in most circumstances an improvement in work performance or conduct. If a person's conduct or work performance does not improve in response to counselling there are a number of options available. These include:

- re-arranging the person's duties;
- movement to an area where a person's skills may be better utilised;
- voluntary reduction in classification;
- procedures for dealing with underperformance; or
- misconduct procedures.

If you are considering formal procedures for dealing with underperformance or suspected misconduct, you should contact the human resources area of your agency for advice. It is essential to address problems with performance or conduct when they arise. If you use them appropriately the formal processes can be effective in dealing with underperformance and misconduct and produce an outcome which is efficient both in terms of maintaining productivity in your workplace and in reducing the negative effects of a protracted, unsatisfactory work situation.

## COUNSELLING FOR POOR PERFORMANCE

Good practice suggests that, before any written warning is issued to a person about underperformance, counselling should take place, observing the following points:

- you should discuss the work standards expected of the person and provide appropriate assistance to enable the person to meet those standards;
- you should make clear to the person where their work is below standard and set goals for improvement over an agreed period;
- you should make records of counselling sessions, signed by both parties; and
- you should give the person the opportunity to explain any reasons for underperformance.

You must use your own judgement to determine the length of time allowed for improvement once you have identified a performance problem but it is best to deal with the issue in a proactive way. There needs to be a balance between the need to treat people fairly and equitably and your responsibility for maintaining the effectiveness of your workplace, bearing in mind the impact one person's underperformance may have on other members of your staff.

## COUNSELLING AND MISCONDUCT

If you believe that an employee may be breaching or may have breached the Code of Conduct in some minor way, you should first raise the issue informally. Drawing a person's attention to the problem may be all that is required, including reference to the APS Values and Code of Conduct. If, however, the behaviour in question is more serious or does not subsequently improve it may be necessary to arrange a more formal discussion to ensure that the person clearly understands what the expected standards are and how he or she may have fallen short of those standards. You should also make the person aware of the possible consequences if there is still no improvement, i.e. the legislative force behind the misconduct procedures, including possible sanctions. In arranging such a discussion the points listed in the preceding section may be a useful guide.

If the person's conduct still does not improve it may be necessary to consult your agency's human resources area regarding formal misconduct action.

**N.B.** These procedures do not apply to an episode of serious misconduct where you must take appropriate action immediately.



# OCCUPATIONAL STRESS ARISING OUT OF FEEDBACK AND COUNSELLING

All workers experience some degree of stress. Whether occupational stress makes a person ill, however, depends on a range of factors, including how their workplace is managed. Research by Comcare suggests that while feedback and counselling can be important tools to reduce occupational stress, if these processes are poorly managed, claims for workers' compensation can arise.

Counselling and providing negative feedback to staff can be stressful for both employees and managers. Being prepared in advance for possible staff reactions to feedback and counselling can greatly assist the effective management of staff. Planning the discussion and trying to anticipate the staff member's reactions and your response can be helpful.

- If the person becomes distressed you should have a strategy to manage the situation. The Comcare publication *Supervisors' Handbook: Managing Staff with Stress Responses* provides more information and ways to handle these situations.
- If the employee does not attend work on the following day, it is essential that the agency implement an early intervention strategy, such as referral to the Employee Assistance Program or staff counsellor, or a further meeting to address unresolved issues. A return to work program using a suitable rehabilitation provider should be considered if the employee does not return to work within 5 days.

**Note:** Any administration expenses in relation to referral to the Employee Assistance Program or staff counsellor will be the responsibility of the agency, regardless of whether Comcare finds liability to pay workers' compensation. Return to work costs will also be the responsibility of the agency unless Comcare accepts liability to pay workers' compensation.

Where you have to provide feedback or counselling in a particularly difficult situation or where you are not sure how to proceed, it may be useful to seek advice and guidance from your human resources area or from your Employee Assistance Program (who will have people skilled in dealing with conflict and a variety of interpersonal situations). In particularly difficult cases of conflict, it may be appropriate to use a professional mediator.

## WORKERS' COMPENSATION CLAIMS FOR OCCUPATIONAL STRESS ARISING OUT OF COUNSELLING AND STAFF FEEDBACK

Claims for workers' compensation for occupational stress can arise out of counselling and feedback sessions. From Comcare's experience many of these claims seem to arise from:

- failure to afford procedural fairness to staff (including not giving a staff member an opportunity to present their reasons for underperformance);
- inadequate prior communication between supervisors and staff on expectations;
- failure to adequately explain to a staff member what the issues of concern are before imposing some perceived penalty; or
- conflict between supervisors and staff on a variety of issues including differing expectations on performance.

Appendix C contains further information about the application of workers' compensation legislation to claims for occupational stress.



## FURTHER READING

**A**lthough these publications pre-date the *Public Service Act 1999* the advice they contain is still relevant.

*The Management of Occupational Stress in Commonwealth Agencies – A Joint ANAO/Comcare Better Practice Guide for Senior Managers, 1997*

*The Management of Occupational Stress in Commonwealth Agencies – Implementing an Occupational Stress Prevention Program, 1997*

# APPENDIX A – COUNSELLING CHECKLIST

The following points may be a useful reference when undertaking counselling.

## BEFORE

- Assess the situation. Establish in what way the person's performance does not meet the required standard. You will need to first identify the duties to be performed and the standards against which performance is to be measured, e.g. timeliness, quantity of output, standard of written work, etc. You should also ensure that these standards are applied equitably across your work area. Gather factual information to support your assessment, including specific examples if possible.
- Determine, to the extent possible, whether there are factors outside the workplace which may be causing the problem.
- Consider your approach. Think of some open-ended questions which will encourage the person to discuss the problem. If you are not confident of handling the counselling, you may need to seek guidance, e.g. from your agency's human resources area or EAP.
- Arrange a venue suitable to the person and yourself, bearing in mind the need for confidentiality.
- Notify the person of the arrangements, giving them sufficient time to prepare for the discussion, including, where possible, sufficient time to arrange for a support person to be present. Depending on circumstances, provide them with copies of any relevant written material you intend to discuss.

## DURING

- Explain the reason for the counselling.
- Explore the possible relevance of factors outside the workplace. You should bear in mind that a person may, for a variety of reasons, choose not to disclose such factors, in which case you can only base your assessment on available evidence. You should, however, encourage disclosure if it will assist in achieving a positive outcome.
- Advise the person what (if any) records are to be kept and for what purpose they will be used.
- Discuss possible solutions.
- During the discussion, remember to:
  - focus on work-related issues;
  - be constructive; look to the future and means of improvement;

- communicate
  - listen actively
  - summarise/repeat briefly, in your own words, what you think are the salient points of the discussion. This lets the person know whether or not you understand what they are saying.
  - ask open questions; you can keep the discussion moving by asking questions that invite a person to talk rather than questions that can be answered ‘yes’ or ‘no’.
- Agree on a plan of action.
- Agree on a timetable for implementing that action and reviewing the results.

#### AFTER

- Make a record of the discussion. If the record is more substantial than a diary note, include any action agreed upon and time frames.
- Invite the person to sign the record if they agree with the content or to make comments or submit their own version of the meeting if they do not. Keep the record in a secure place.
- Follow up on any action which has been agreed upon, either by undertaking action yourself (i.e. assisting with on-the-job training or exploring training opportunities) or monitoring and reviewing action to which the person has agreed.

## APPENDIX B – MANAGING POOR PERFORMANCE CHECKLIST

It may be useful to use a checklist of good practice for successfully handling cases of continuing poor performance.

- *Clear job specification/instructions*  
Ensure that the person has a copy of the current job documentation, and that they understand the standards of work performance that are expected of them. Have clearly defined targets.
- *Adequate training*  
Ensure that the person has received appropriate training and assistance to perform the duties.
- *No surprises*  
Any significant concerns about the person's performance should be drawn to their attention at the time the concern arises, rather than waiting until formal appraisal time. It is poor practice and very unfair to use a referee report, probation report or appraisal report as a first means of expressing concern about a person's performance.
- *Counselling*  
The person must be given an opportunity to respond to allegations of continuing poor performance. Ensure that you have shown the person where their performance is below the standard expected and that goals for improvement have been set and monitored for an agreed period of time.
- *Written records of counselling*  
Ensure that you keep clear, accurate and relevant, written records of discussions with the person about work performance problems. These records should be signed by the person and they must be given the opportunity to provide comment.
- *Other possible factors*  
Ensure that you have looked into other possible causes of poor performance, such as medical problems and personal difficulties and provided the person with appropriate opportunities to deal with these problems.
- *Formal warning*  
Ensure that the work standards and performance problems detailed in the formal warning are consistent with those you raised with the person during counselling. (Documentation should be developed with advice from your agency's Human Resource Manager.)

## APPENDIX C – APPLICATION OF THE SAFETY, REHABILITATION AND COMPENSATION ACT 1988

Claims for workers' compensation arising out of feedback and counselling processes are determined on a case by case basis in accordance with the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act). As an independent decision maker, Comcare looks at all evidence provided by the employee and the employer and any other information Comcare considers relevant. The following principles apply to the determination of these claims in relation to assessment of the claimed medical conditions, the contribution of employment and the application of the exclusionary provisions.

### Medical condition

In the case of psychological disorders, workers' compensation is payable where a person suffers a disease to which work makes a material contribution. A Federal Court case (*Mooi v Comcare*) has defined a psychological condition to be a disease for the purposes of the SRC Act where a person has a condition that is outside the boundaries of normal mental functioning and behaviour.

Psychological stressors will not lead to an accepted claim for workers' compensation where the stressors produce a reaction in an employee that is 'within the range of normal human responses to distressing events'.

It is generally Comcare's policy that a person must be suffering from a medical condition diagnosed by a medical practitioner in accordance with the *Diagnostic and Statistical Manual of Mental Disorders* (4<sup>th</sup> ed.)(DSMIV) or the *International Classification of Diseases 10* (ICD 10). Compensation is not generally payable where a person is merely unhappy, distressed or aggrieved by actions taken by an agency but is not suffering from a diagnosed work related medical condition.

### Material contribution by employment

The SRC Act requires that a claimant's disease or medical condition is materially contributed to by employment. In examining whether employment has materially contributed to a condition, Comcare will look at whether the employment contribution is evidenced on the balance of probabilities as opposed to possibilities. The onus will be on the employee to establish the case for material contribution. The Second Reading speech for the SRC Act states that

it is intended that the test will require an employee to demonstrate that his or her employment was more than a mere contributing factor in the contraction of the disease. Accordingly it will be necessary for an employee to show that there is a close connection between the disease and the employment in which he or she was engaged.

In determining whether employment contributed in a material degree to the contraction of a disease in a particular case, regard would be had to whether the employment to which the employee was engaged carried an inherent risk of the employee contracting the disease in question and whether some characteristic or feature of employment tended to cause, aggravate or accelerate the disease. (pp 2192-2193)

In interpreting material contribution of employment Comcare relies on the definition of employment found in *Federal Broom Pty Ltd v Semlitch* which states that ‘when the Act speaks of “the employment” as a contributing factor it refers not to the fact of being employed, but to what the worker does in his employment. The contributing factor must in my opinion be either some event or occurrence in the course of his employment or some characteristic of the work performed or the conditions in which it is performed’. (See the *Annotated SRC Act 1988*, 4th edition, edited by John Ballard and Peter Sutherland, 1999).

In determining material contribution of employment Comcare will examine the factors precipitating the claimed condition and the various reports on the events in the workplace from parties involved including the claimant and the employing agency.

In this context, Comcare will also consider whether management action was reasonable or not, whether there were any breaches of due process, whether there were any particular characteristics of the work and whether there were any particular events that may have contributed to the condition. The consideration of these factors will vary from case to case.

### Application of exclusionary provisions

The Act excludes payment of workers’ compensation where the medical condition is as a result of the person failing to obtain a promotion, transfer or other benefit in connection with employment or reasonable disciplinary action. In the case of claims involving counselling and feedback processes, the reasonable disciplinary action exclusionary provision will only be considered where the counselling is part of a formal disciplinary process (see *Comcare v Chenhall*). Depending on the circumstances of the case, consideration will be given to applying the other exclusionary provision if the counselling or feedback relates to failure to obtain a promotion, transfer or other benefit.

## OTHER ISSUES

### Employer statements

To assist Comcare in determining these claims, agencies should provide employer statements that detail the history leading up to the claim from the employer’s perspective, including information on what led to the counselling and/or feedback session, what processes were followed during the counselling and/or feedback and other information that the agency thinks may be relevant to the claim. Statements should be factually based on the actual events and not about the feelings of individuals involved in the claim.

## Section 71 of SRC Act

Agencies should be aware that Comcare has the power under section 71 of the SRC Act to request that a Secretary provide all documents that an agency has in its possession relating to a claim for compensation. This can include notes taken of counselling and feedback sessions.

Comcare is not responsible for arbitrating disputes between agencies and staff involving allegations of improper practice or the appropriateness of certain management action. Other internal administrative forums are a more appropriate means to determine these issues, e.g. grievance mechanisms.

## Appeals Process

An agency or a claimant who disagrees with a determination made by Comcare can request reconsideration by an internal review officer of the original decision. Should the agency or claimant disagree with the decision of the internal review officer, an application may be made to the Administrative Appeals Tribunal for a review of that decision.

Further information can be obtained from Comcare Claims Management Centre, Canberra.