

Making a finding

At the conclusion of an agency's investigation of a reportable allegation under Part 3A of the *Ombudsman Act 1974*, the head of agency should assess the evidence regarding the allegation(s) and any conclusions or recommendations made by the investigator, and make a finding in relation to each allegation. The finding should inform an agency's final risk assessment and any action taken to mitigate ongoing risks, including reporting any findings of workplace misconduct to the Office of the Children's Guardian (the Guardian).

The civil standard of proof, 'the balance of probabilities', applies to agency investigations of reportable allegations against employees. This means that the agency need only be satisfied that it is 'more likely than not' that the allegation is true, in order to sustain an allegation. However, the amount of evidence required to reach this level of satisfaction will be greater the more serious the allegation under investigation, and the likely consequences for the employee if the allegation is proven, the greater the weight of evidence that is required. This is known as the 'Briginshaw' principle.

The head of agency must assess the strength or weight of the evidence, when making a finding. However, the strict rules of evidence that apply in court do not apply to agency investigations of reportable allegations. There are some general considerations that can assist in determining how much weight to place on information and to determine a finding. These considerations are not independent from one another, so evidence that satisfies one consideration may very well also satisfy others. The head of agency should consider how reliable the evidence may be; if it is relevant to the alleged conduct; if accounts are consistent (over time, with other evidence, and more or less plausible); and whether there is any other evidence to corroborate or contradict an allegation.

Available findings

For the purposes of the Ombudsman's employment-related child protection scheme, a finding in an agency investigation of a reportable allegation may be that the allegation is:

- sustained (ie a finding that the conduct occurred), or
- not sustained – insufficient evidence (ie there is some evidence of weight however there is insufficient evidence available to reasonably establish that the alleged conduct did occur), or

- not sustained – lack of evidence of weight (ie where the evidence is of such poor probative value or lacking in weight, such as to warrant a finding that, on the balance of probabilities, the conduct did not occur), or
- false (ie where inquiries into the matter show reportable conduct or an act of violence did not occur). Some of these matters may be vexatious, for example where inquiries into the matter show the allegation was made without substance and to cause distress to the person against whom the allegation was made, or
- not reportable conduct (ie where inquiries into the matter show the conduct was not reportable). For example, use of force that was trivial or negligible in the circumstances, conduct that was reasonable in the circumstances or accidental. This may include 'misconceived' matters, where inquiries into the matter show that, even though the allegation was made in good faith, it was based on a misunderstanding of what actually occurred and the incident was not reportable conduct.

Note: Matters considered to be 'trivial or negligible', or of a class or kind exempted from being reportable conduct under s.25CA of the Ombudsman Act (ie matters that fall within a Class or Kind Determination are examples of reportable conduct that are exempted from notification to the Ombudsman).

Notification to the Children's Guardian

The *Child Protection (Working with Children) Act 2012* and the *Child Protection (Working with Children) Regulation 2013* replaced the CCYP Act and its associated Regulation on 15 June 2013. The Act and the Regulation contains specific definitions of which agency constitutes a prescribed reporting

Practice Update January 2014: Making a finding

body, what is a reportable finding, what conduct is required to be reported, and what constitutes 'child related work', for the purposes of any notification to the Guardian.

Certain agencies, including NSW Government agencies, public sector agencies and certain designated non-government agencies, considered to be reporting bodies¹ under the Guardian's jurisdiction,² are required by s.35 of the *Child Protection (Working with Children) Act 2012* to notify the Guardian of any child-related worker³ against whom the

reporting body has made a finding (a 'sustained' finding) that the worker has engaged in conduct specified in clause 2 of Schedule 1.⁴

In addition, those matters exempted from notification to the Ombudsman by virtue of a Class or Kind Determination with an agency or a sector, are likely not reportable on finding to the Guardian.

For further information, visit the office of the Children's Guardian website at <http://www.kids.nsw.gov.au>

-
- 1 See s.35 of the *Child Protection (Working with Children) Act 2012* and Clause 25 of the *Child Protection (Working with Children) Regulation 2013* for a list of prescribed reporting bodies.
 - 2 See s.35 'Notification by reporting bodies of conduct constituting assessment requirement trigger' of the *Child Protection (Working with Children) Act 2012*.
 - 3 See s.6 'Child-Related Work' 5 of the *Child Protection (Working with Children) Act 2012* and Part 4 'Exemption of workers and employers from Act' of the *Child Protection (Working with Children) Regulation 2013*
 - 4 See Clause 2 of the *Child Protection (Working with Children) Regulation 2013*.

Contact us for more information

Our business hours are: Monday to Friday, 9am–5pm (*Inquiries section closes at 4pm*).

If you wish to visit us, we prefer you make an appointment. Please call us first to ensure your complaint is within our jurisdiction and our staff are available to see you.

Level 24, 580 George Street
Sydney NSW 2000

Email nswombo@ombo.nsw.gov.au

Web www.ombo.nsw.gov.au

General inquiries 02 9286 1000

Facsimile 02 9283 2911

Toll free (outside Sydney metro) 1800 451 524

Tel. typewriter (TTY) 02 9264 8050

Telephone Interpreter Service (TIS): 131 450
We can arrange an interpreter through TIS or you can contact TIS yourself before speaking to us.

