

## Planning and conducting an investigation

This fact sheet outlines the key issues to consider when responding to an allegation about an employee's conduct towards a child or children. The nature and circumstances of allegations against employees can vary. Agencies need to ensure that adequate information has been collected to enable them to make sound decisions in relation to the employee, the child(ren) involved and any witnesses.

### Initial response to an allegation

On receipt of an allegation, the relevant staff of an agency should:

- clarify the allegation – exactly what has been alleged? Who, what, when, where? For example:
  - › the identity of the person making the allegation, the child(ren) or young person(s) involved, the employee against whom the allegation has been made, and any witnesses
  - › when and where the alleged incident or incidents occurred
  - › a description of the acts and/or omissions which form the basis of the allegation against the employee, and
  - › where it is not clear, clarify the estimate of physical force if physical assault or ill-treatment is being alleged.
- assess whether or not a child or young person is 'at risk of significant harm' and, if so, make a report to the Community Services 'Helpline'.
- consider whether or not the allegation may constitute a criminal offence and if so, make a report to police before taking any further action (seek advice from police as to what you can and can't do).
- assess any possible risks posed by the employee to children in the agency's care and take any necessary interim action to ensure the safety and well being of the children. Agencies need to consider whether or not the employee's duties need to be changed during the investigation process.

**Note:** See Fact sheet 9 for more information on risk assessment and risk management.

- assess whether or not the allegation relates to 'reportable conduct' and, if so, ensure that the notification is made to the Ombudsman within 30 days of the head of agency becoming aware of the allegation.
- consider who else may need to know about the allegation, as well as what to tell people who are not involved but are aware of the allegation (eg other employees or parents). Generally, all parties to an investigation should be reminded of the sensitive and confidential nature of the matter and be advised that it is not appropriate to discuss the situation.

**Note:** The agency's child protection policy and/or disciplinary procedures should include information about confidentiality

- address any support needs of both the child and the employee who is the subject of the allegation, including victim support provisions under the new *Victims Rights and Support Act 2013* (for further information visit [www.lawlink.nsw.gov.au/vs](http://www.lawlink.nsw.gov.au/vs)).

### Planning and coordinating the investigation

If Police and/or Community Services were advised of the allegation, ensure that your agency has clearance from either or both agencies before engaging in any fact-finding activities. Once you have permission to conduct your investigation in relation to your employee;

- spend some time planning the action to be taken and documenting any decisions that are made before the commencement of the investigation. This process should involve clearly defining the allegations, identifying appropriate sources of information (eg witnesses, available records that may be held by the employer or another agency), defining and assigning tasks, and determining approximate timeframes.
- keep a record of this planning process. This can be a formal, typewritten document or simply notes or dot-points in the relevant file. An investigation plan is a record of what the agency intends to do, who will do what, why it is being done, how it is to be done, what information needs to be gathered, what the agency hopes to achieve and when it needs to be done.
- consider any actual or potential conflict of interest that may be held by the investigator, particularly in relation to the employee or the child and take steps to manage any identified risks.
- identify and address any cultural issues and any special needs of relevant parties.
- identify people or agencies to consult for advice about the investigation process if required, such as the Ombudsman's office or a relevant peak body or agency.
- consider what aspects of the investigation might have been conducted by another agency. For instance, when NSW Police, Community Services or NSW Health has been involved, (eg the Child Abuse Squad, or Community Services,

## Planning and conducting an investigation

workers have interviewed the child(ren) and/or the employee), the agency is entitled to request information from those agencies if it relates to the safety, welfare and well-being of a child or young person, or a class of children or young people. By securing information such as interview notes, an agency may be able to avoid re-interviewing children.

## Information gathering

Relevant information can be obtained from a range of sources:

- direct evidence or information can be obtained by speaking with people (eg the child, witnesses or the employee) who were involved in the alleged incident or who saw or heard an event. In some circumstances, it may be necessary to obtain information from people who have had conversations or have other information about an event.
- physical evidence can be obtained by collecting documents (eg rosters, emails), securing and inspecting objects (eg mobile telephones, computers) and inspecting locations to check the relative positions of parties and witnesses to the alleged incident (eg playgrounds, classrooms). This process could include taking relevant photographs and making drawings or diagrams of the location of the alleged incident.
- information can be obtained from people who have specialised knowledge in a specific field that the general public do not have. For example, information from a medical practitioner may be relevant if they had examined a child or young person.
- when the police or Community Services have been involved, requests for information from, or provision of information to these agencies generally should be made in accordance with Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998*, and by referring to your responsibilities to investigate reportable allegations made against your employee under Part 3A of the *Ombudsman Act 1974*. Requests should be directed to the unit investigating the matter. In relation to the police, this may be either the Local Area Command or the Child Protection and Sex Crimes Squad. In relation to Community Services, this would be its Central Office (explain the information requested for referral to the appropriate section).
- in 2011 NSW Police implemented Standard Operating Procedures (SOPs) in relation to employment related child abuse allegations, to assist operational police when responding to such allegations and related requests for information. The Local Area Commands (LACs) are the contact point for agencies seeking this information.
- if an agency has any problems in obtaining relevant information from either Community Services or the police, or any other source, contact the Ombudsman's Office for advice.

- ensure that all information collected in relation to the investigation is kept in a safe and secure place, with access only by approved persons in the agency. Records relating to information concerning allegations against an employee should be kept on a file separate to the employee's personnel file, with only information pertinent for the professional management of the employee after the investigation to be copied to their personnel file.

## Other issues to consider during this process include:

- Ensure that all people involved in the investigation are reminded of the importance of confidentiality.
- Where appropriate, advise the parent or carers of any involved child that an allegation has been made and/or seek their permission to interview their child, if appropriate.
- Interview the child (if appropriate) and relevant witnesses in a logical and appropriate sequence.
- Ensure that all interviews are adequately recorded, as verbatim as possible, including details of the questions and responses, the location of the interview, who was present and the start and finish times of the interview. Where possible, ensure records are verified, signed and dated by all involved.
- Structure interviews to ensure the purpose is clear, all available information is elicited and evidence is not contaminated. However, be prepared to be flexible so that allegations arising during the interview can be appropriately responded to. This might include, for example, ceasing an interview if a criminal disclosure is made, or pursuing an additional allegation in the context of the current allegation/s.
- Review the initial assessment of risk and take further action to address concerns, if warranted.
- Document any other allegations that emerge during the course of the investigation and what the agency did about this new information. Some of these allegations may be about events that occurred some time ago.
- Document the rationale for all decisions made in relation to the investigation, including the action taken regarding the employee during the investigation and the reasons why particular action is taken or not taken.
- Document all advice (both given and received), and discussions in relation to the investigation, and place it on file, including copies of emails.
- Ensure that relevant people, such as the employee, the alleged victim and, where appropriate, their parents are advised of the outcome of the investigation, to the extent permitted.

## Employee's response to the allegation

- The point at which the employee is told about the allegation and given an opportunity to respond can be critical to the success of an investigation and can impact on the degree and duration of stress experienced by the employee. This step should therefore be carefully considered. If Community Services and/or the police wish to interview the employee, the agency will need to consult with these agencies about what it should say to the employee.
- When all the relevant information has been obtained, the allegation should be formally put to the employee and the employee should be given an opportunity to respond; whether at an interview or in writing.
- The employee may wish to have a support person present if they are interviewed about the allegation. The support person may be invited to observe but should be advised not to unnecessarily interrupt the interview and to keep details confidential. The appropriateness of the support person should also be considered. For instance, a witness in an investigation would not generally be an appropriate support person.
- This interview should be adequately recorded. It should be recorded as verbatim as possible, and where possible, ensure such records are signed and dated by all involved as a true and accurate record of the interview.
- It may be necessary to re-interview the employee if new information comes to light.
- The purpose and process of the investigation, the employee's rights, the role of the Ombudsman and, if appropriate, the role of the Office of the Children's Guardian, should be clearly explained to the employee.

## Making a finding

- The investigator should document all of the information gathered during the investigation, then coherently and objectively analyse and weigh the evidence to support any conclusions. They should then identify the finding/s best supported by the available evidence and propose any recommendations arising from the investigation. This material should be provided to the head of agency or their delegate to make a decision on the matter.
- Ideally, the person making the decisions about the recommendations should be separate to the investigator and in a more senior position.
- 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 as '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) still require a finding to be made.

- The decision-maker should then:
  - › make a decision as to whether to accept or reject any recommendations made by the investigator. The reasons for making an alternative decision should be documented
  - › send letters, if appropriate, to the child or young person, their parents or carers and the complainant to inform them of the outcome of the investigation. The letter(s) should take account of the privacy rights of the employee who is the subject of the allegation. The letter(s) could include an offer to discuss the matter, if appropriate
  - › send a letter to the employee stating the outcome of the investigation and the action that will be taken. This letter could include an offer to discuss the matter, as appropriate.

**Note:** Also see *Practice update 01/2014 - Making a finding*

## Taking action

- A decision needs to be made about what action should be taken as a result of the investigation, including possible disciplinary action in relation to the employee who is

## Planning and conducting an investigation

the subject of the allegation, amendments to policy and procedures, and any strategies to minimise future risk of reportable conduct by the employee.

- Any previous relevant matters relating to the employee should be considered when deciding the appropriate action to take as a result of this investigation.
- If, at the end of the investigation, the allegation is found to be false and vexatious, a decision should be made regarding what action to take, if any, against the person(s) who made the allegation.
- The head of agency should send the final report and the results of the agency investigation to the Ombudsman.
- If the agency is a reporting body under the *Child Protection (Working with Children) Act 2012* and the Child Protection (Working with Children) Regulation 2013, and the employee is not exempted under the Act, the employer should notify the Office of the Children's Guardian if they have made a sustained finding of sexual misconduct committed against, with or in the presence of a child, or serious physical assault of a child, under S.35 of the Act.
- All information relating to the investigation should be stored in a secure place that is separate (but linked by reference) to the employee's personnel file, except for any outcome impacting on the employee's work. For instance, if the employee is directed to amended duties, training, counselling or additional supervision, is allowed to resign, or is dismissed by the agency.

**If you have any queries or comments, we are here to assist you. Call the NSW Ombudsman's Employment Related Child Protection Division on 02 9286 1000.**

---

### 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](mailto:nswombo@ombo.nsw.gov.au)

**Web** [www.ombo.nsw.gov.au](http://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.

