

# ACT Ombudsman Practice Guide No.4

## Planning and Conducting an Investigation

The reportable conduct scheme is intended to oversee how organisations prevent and respond to allegations of child abuse and misconduct.<sup>1</sup> This practice guide outlines some of the key issues that an employer<sup>2</sup> under the scheme might consider when responding to an allegation of reportable conduct about an employee.<sup>3</sup>

Broadly speaking, reportable conduct is child abuse or misconduct with a child.<sup>4</sup>

### Initial response to an allegation

When an employer receives an allegation about an employee, relevant staff should:

- clarify the allegation<sup>5</sup> and consider exactly what has been alleged
- record the who, what, when and where including:
  - the identity of the person making the allegation
  - the child/ren involved and their details
  - the employee who is the subject of the allegation
  - any witnesses
  - when and where the alleged incident occurred
  - a description of the acts that form the basis of the allegation
  - whenever possible ensure that the individual making the allegation, or their parent or carer, signs a document outlining their concern to confirm the employer has an accurate record of the allegation.
- consider whether or not the allegation may constitute a criminal offence and, if so, report to ACT Policing before taking any other action and seek advice from police as to how to proceed. It may also be appropriate to discuss with ACT Policing any proposed changes to the employee's duties

<sup>1</sup> See the [Ombudsman Act 1989](#) (the Act).

<sup>2</sup>The word 'employer' is substituted for the term 'designated entity.' See s 17EA in the Act for the definition of 'designated entities.'

<sup>3</sup>The definition of employee includes all employees of a designated entity, whether or not they provide services to children. Contractors and volunteers are also employees but only if they provide services to children. It also includes employees engaged by another organisation to provide services to children on behalf of the employer covered by the scheme.

<sup>4</sup>For further information on the definition of reportable conduct, see *The ACT Ombudsman Practice Guide No. 2: Identifying Reportable Conduct* on our website.

<sup>5</sup> The term allegation refers to express assertions that reportable conduct has occurred or may have occurred.

- assess whether or not there is a reasonable belief or suspicion that a child<sup>6</sup> is at risk of abuse or neglect and report as appropriate to the Child and Youth Protection Services (CYPS)
- assess any possible risks posed by the employee to child/ren in the employer's care and take any necessary interim action to ensure the safety and wellbeing of the child/ren<sup>7</sup>
- assess whether or not the allegation relates to reportable conduct and, if so, report to the Ombudsman. The Ombudsman encourages contact as soon as possible, but no later than 30 days after the employer becomes aware of the conduct using the s 17G Notification available on our website
- 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 (for example other employees or parents)
- address any support needs of both the child and the employee who is the subject of the allegation.

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. Ideally, the employer's child protection policy or code of conduct should include information about the need for and expectations around confidentiality.

## Planning and coordinating the investigation

If ACT Policing and/or CYPS were advised of the allegation, the employer should ensure that they have clearance from the relevant agency before starting an investigation or engaging in any fact-finding activities. A risk assessment should be conducted to consider the safety of those involved. The employer or relevant person acting on behalf of the employer, should:

- plan the action to be taken and document any decisions that are made before the commencement of the investigation
- consider as part of the initial planning process:
  - clearly defining the allegations
  - identifying appropriate sources of information (for example, witnesses, records that may be held by the employer or another designated entity, maps, pictures, electronic recordings, texts, information stored on a computer)
  - defining and assign tasks such as who will interview witnesses
  - determining approximate timeframes
- keep a record of the planning process. This may be a formal, typed document or simply notes on the file. An investigation plan is a record of what the employer intends to do, who will do what, why it is being done, what information needs to be gathered, and timeframes for completion. An example investigation plan is provided at the end of the practice guide.
- consider any actual or perceived conflict of interest, particularly in relation to the employee or any child/ren involved and take steps to manage these.

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<sup>6</sup> For purposes of this practice guide and the scheme, the word child includes children, a young person and young people and refers to an individual who is under 18 years old or a group of individuals who are under 18 years old.

<sup>7</sup> For more information on how to assess risk see *The ACT Ombudsman Practice Guide No. 3: Risk management Following an Allegation Against an Employee* on our website.

- 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 (for example, the Ombudsman, ACT Policing, CYPS, Access Canberra, Teacher Quality Institute, Children's Education and Care Assurance, Human Rights Commission).

### Procedural fairness

Procedural fairness is about ensuring that the employer's response or investigation process is fair. *The ACT Ombudsman Practice Guide No. 9: How the Ombudsman Assesses an Employer's Response/Investigation*, identifies the following indicators of procedural fairness:

- informing people against whose interests a decision may be made of the substance of any allegations against them or the grounds for adverse comment about them
- providing people with a reasonable opportunity to put their case, whether in writing or otherwise
- hearing all parties to a matter and considering all submissions made
- making reasonable inquiries or investigations before making a decision
- ensuring that conflicts of interest are managed
- acting fairly and without bias and
- conducting investigations without undue delay (allowing for the pre-eminence of criminal and statutory child protection investigations).

Procedural fairness does not require that the employee is immediately notified of an allegation when an employer becomes aware of the concern (see 'Employee's response to the allegation' below).

### Information gathering

Relevant information can be obtained from a range of sources:

- physical evidence can be obtained by collecting documents, securing and inspecting objects (for example, rosters or emails, an electronic device or computer<sup>8</sup>)
- 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 have examined a child)
- agencies such as CYPS or another designated entity, a request for information may be made in accordance with relevant legislation<sup>9</sup>

The employer should ensure that all information collected is stored securely and accessed only by approved persons. Records relating to information concerning allegations against an employee should be kept on a file separate to the employee's personnel file. Only information relevant for the professional management of the employee after the investigation should be copied to their personnel file.

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<sup>8</sup> Care should be taken prior to accessing an electronic device as data may be inadvertently deleted. Organisations may need to enlist the assistance of an expert to consider electronic data.

<sup>9</sup> For more information watch for *The ACT Ombudsman Practice Guide No 8: Information Sharing* on our website.

## Other issues to consider

There are other issues that the employer should consider when planning a response to, or investigation of, an allegation, including:

- where appropriate, advising the parent or carers of any child involved that an allegation has been made and/or seek their permission to interview their child if necessary (employers should seek guidance from CYPS or ACT Policing, if they are involved in a matter, prior to contacting parents or carers)
- ensuring that all interviews are adequately recorded, verbatim if possible, including:
  - details of the questions and responses
  - the location of the interview
  - who was present
  - if a support person was offered and if they attended
  - the start and finish time of the interview
- where possible, employers should provide records of interview to interviewees for review and structure interviews to ensure:
  - the purpose is clear
  - all available information is elicited and the evidence is not contaminated
  - interviewers are flexible so that allegations arising during the interview may be responded to appropriately. This might include, for example, ceasing an interview if a criminal disclosure is made, or pursuing an additional allegation in the context of the previously understood allegations
- reviewing the initial assessment of risk and taking further action to address concerns if warranted<sup>10</sup>
- documenting the reasons for all decisions made about the investigation, including the reasons why particular action was taken or not taken
- documenting any other allegations that emerge during the course of an investigation and what the agency did about this new information
- documenting all advice (both given and received), and discussions in relation to the investigation, and place it on the file, including copies of emails
- ensuring that relevant people, such as the employee, the alleged victim and, where appropriate, the parents or carers of the alleged victim, are advised of the outcome of the investigation to the extent appropriate.

## Employee's response to the allegation

Deciding when to tell an employee about an allegation and providing them with an opportunity to respond should be carefully considered. This decision can also impact on the degree and duration of stress the employee experiences. If

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<sup>10</sup> For more information on how to assess risk see *The ACT Ombudsman Practice Guide No. 3: Risk management Following an Allegation of Reportable Conduct Against an Employee* on our website.

CYPS or ACT Policing wish to interview an employee, the employer should consult with these agencies prior to interviewing the employee.

When the employer has gathered all the relevant information, the allegation should be formally put to the employee and the employee should be given an opportunity to respond.

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.

The interview should be adequately recorded. It should be recorded as verbatim as possible, and where possible, employers should provide records of interview to the interviewee for review, verification, signature and dating.

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 ACT Ombudsman and the role of any regulators, as appropriate, should be clearly explained to the employee.

## The Decision Maker

The employer should document all of the information gathered during the investigation, then analyse and weigh the evidence to support any conclusions.

A reportable conduct investigation should apply the 'balance of probabilities' as the standard or proof. This means that findings should be based on whether it is more likely than not that reportable conduct has occurred.

The employer 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 the designated entity or their delegate to make a decision on the matter.

Ideally, the person making the decisions about the recommendations should not be the investigator and should be in a more senior position to the investigator.

When a decision maker considers an allegation of reportable conduct, the finding in the matter may be:

- sustained
- not sustained – insufficient evidence
- not sustained — lack of weight
- false (inquiries show that the conduct was not reportable)
- not reportable conduct.

See *The ACT Ombudsman Practice Guide No. 6: Making a finding* for further guidance. This document is available on our website.

## Taking action and finalising the report

Once a finding is made, the decision maker must consider what, if any, action should be taken. Such action may include disciplinary action in relation to the employee who is the subject of the allegation, amendment to policy and procedures, and any strategies to minimise future risk of reportable conduct by the employee.

The decision maker should consider any previous, relevant matters relating to the employee when deciding the appropriate action to take as a result of this investigation and the finding.

When the decision maker has decided on what action to take, a final report should be submitted to the ACT Ombudsman (see *s 17J Final Report* template on the website). The employer should consider whether it is appropriate to notify any other agencies at the conclusion of the investigation (for example, Access Canberra, the Teacher Quality Institute, Australian Health Practitioner Regulation Agency, the Human Rights Commission, the Human Services Registrar).

Employers should store information relating to the investigation securely in a file, separate but linked by reference to the employee's personnel file. It may be appropriate to note an outcome impacting the employee's ability to work on the personnel file. For example, if the employee is directed to amended duties, training, counselling or additional supervision, resigns or is terminated.

### Example Investigation Plan

An example template is provided at the end of this practice guide for employers to consider when developing an investigation plan.

### Contact

We encourage early contact with the ACT Ombudsman. You can contact us using the details below.

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More information is available at [ombudsman.act.gov.au](http://ombudsman.act.gov.au)

Please note: This document is intended as a guide only. For this reason, the information should not be relied on as legal advice or regarded as a substitute for legal advice in individual cases. To the maximum extent permitted by the law, the ACT Ombudsman is not liable to you for any loss or damage suffered as a result of reliance on this document. For the most up-to-date versions of cited Acts, please refer to [legislation.act.gov.au](http://legislation.act.gov.au).

ACT Ombudsman Investigation Plan Template (Example — organisations may use alternative templates)

<p>Name of Alleged Victim/DOB/address/parents or carers</p>	
<p>Name of Person Subject of the Allegation (PSOA) Is the PSOA an employee? DOB/address/Working With Vulnerable People Registration/TQI Registration/Health Registration or others as applicable.</p>	
<p>Does the allegation involve conduct that needs to be considered using an investigation process or are there other ways to resolve the issues? Identify core factual issues</p>	
<p>Who will investigate? To what regulatory bodies should this matter be reported? (Ombudsman, Teacher Quality Institute, Access Canberra, Australian Health Practitioner Regulation Agency, Children Education and Care Assurance etc.)</p>	
<p>Who will provide counselling and other supports as identified in the risk analysis?</p>	
<p>Are there any identified conflicts of interest?</p>	
<p>Proof/Facts in issue— draft allegations after consideration of scope and purpose</p>	

<p><b>Scope and purpose:</b></p> <ul style="list-style-type: none"> <li>• Legislative Framework</li> <li>• Relevant policy/code of conduct</li> </ul>	
<p><b>Benchmarks/criteria</b></p> <p>Does the PSOA have prior concerns disciplinary or administrative issues to be considered as appropriate?</p>	
<p><b>Resources</b></p> <ul style="list-style-type: none"> <li>• documents that should be reviewed</li> <li>• technical facilities (for example, computers, laptops, audio/video recording equipment)</li> <li>• places that should be visited</li> <li>• assign information gathering tasks as appropriate</li> </ul>	
<p><b>Consider who will be interviewed</b></p> <p>Keep a list of affected persons (people who may be adversely affected by the investigation)</p> <p>Timeframe for completion</p>	

**Example Investigation Log**

No	Activity/Task/Date	Contact details/person completing task	Follow up/other tasks
1	1 January 2020 Review documentation	Investigator	Write allegations