

Planning and conducting an investigation

The NSW Reportable Conduct Scheme – Fact sheet 4

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The role of the Reportable Conduct Scheme

The Reportable Conduct Scheme provides a framework for the oversight of how organisations respond to reportable allegations that have been made against their employees. It is set out in Part 4 of the *Children's Guardian Act 2019* (the Act). The Scheme aims to ensure that reportable allegations are responded to in a way that ensures children are kept safe and employees are treated fairly.

This fact sheet outlines the key issues to consider when planning and conducting your agency's response to an allegation.

Initial response to an allegation

The initial response to child safety concerns is critical, because if the initial response is deficient, any future investigation can be compromised and children can be placed at risk, or continued risk.

Clarifying the allegation

Taking steps to understand the nature of the allegation – including whether it is a reportable allegation and whether it is an allegation of a criminal offence – is an important first step. Sometimes this will require relevant persons in the entity to make some clarifying inquiries. Any such initial inquiries should be limited to those needed to clarify the allegation and plan a response. At this stage, entities are assessing whether there is an allegation that needs to be reported; not the likelihood that it is true or not true – that will occur as part of the investigation.

Particular caution should be taken when the source of the allegation is a direct disclosure from a child. If the child's free discourse is enough to give you an understanding of the type of allegation you're dealing with, it is important to provide support but not ask further questions. If you *need* to ask questions to clarify the nature of the concern, it is important to use open ended questions – that is, questions that cannot be answered yes or no.

Where there is no immediate significant risk of harm to a child, a measured approach can be taken by the employer to assess and plan their response to a reportable allegation, before taking action. See Fact Sheet 3 for guidance on initial risk management.

Immediate risk

However, in cases where a child is at immediate risk of serious harm from an employee, the employer has a duty to take prompt and decisive action to manage those risks. That may mean taking immediate steps to cease and prevent further contact between the employee and the child who is the alleged victim of reportable conduct or any other children. It may also involve securing forensic evidence.

The reasons for taking any immediate action of this type should be documented at the earliest opportunity.

Reporting to police

If a reportable allegation requires a report to Police (that is, if it is a criminal offence), this should be the first step the head of the relevant entity takes after addressing any immediate significant risk to children or the investigation.

After reporting to Police, you should not take any investigative action in response to the reportable allegation without first confirming whether or not Police will conduct inquiries or an investigation. You will still need to make your 7-day notification to the Guardian, and you can request our guidance if you are unsure of how to proceed.

If Police are conducting inquiries, you should consult with the police officer in charge about any action you propose to take, including risk management action. This is to ensure that any police investigation is not compromised. Generally, when police are investigating the allegation, an employer should not take any action to alert the employee – directly or indirectly – to the allegation until clearance to do so is provided by Police.

If the head of a relevant entity has concerns that risks to children in their organisation are not being managed while a police investigation is underway, it is important to alert Police to these concerns and also raise these concerns with the Children's Guardian.

Reporting to the Child Protection Helpline

At the same time, if a mandatory report to the Child Protection Helpline of the Department of Communities and Justice (DCJ) is required, because a mandatory reporter has reasonable grounds to suspect that a child or children are at risk of significant harm, the head of the relevant entity (or delegate) must make this report immediately.

When making this report, it is important to let the Helpline know if you have also made a report to Police. Any response from DCJ (including any joint response through the Joint Child Protection Response Program – JCPRP) takes priority over the reportable conduct response.

Notifying the Children’s Guardian

After making any mandatory reports to Police and DCJ, if the allegation constitutes a reportable allegation, you will need to make your notification to the Office of the Children’s Guardian. This notification is required to be made within 7 business days of becoming aware of the reportable allegation, unless there is a reasonable excuse for not doing so.

You should undertake your initial risk assessment before notifying the Guardian, as you are required to provide the Guardian with information about how you are managing risks.

Planning and coordinating the investigation

When planning your response to a reportable allegation, bear in mind that the scope of an investigation will depend on – and should be commensurate with – the circumstances of the case. Under the Act, an ‘investigation’ can include any preliminary or other inquiry into, or examination of, the matter.

Who will conduct the investigation?

Depending on the size and nature of your organisation, it can be necessary and/or best practice to separate the investigation of a reportable allegation from the ultimate decision-making around the allegation.

Large organisations may have their own investigations unit or investigator to respond to reportable allegations. In such cases, the head of the relevant entity or their delegate will ultimately make the finding. In medium-sized organisations with no dedicated reportable conduct investigator, the head of the relevant entity may outsource the investigation or, for less complex matters, assign the investigation to another employee or conduct the investigations themselves. In small organisations it is often not feasible to separate the investigator and decision-maker and they will be the same person.

As long as the information gathering process is procedurally fair and the decision-making process is transparent, accountable and supported by the evidence, the process will withstand scrutiny.

Investigation plan

An investigation plan is a record of what the entity 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 entity hopes to achieve and when it needs to be done. A clear and detailed investigation plan will assist an entity to meet its various obligations under the Children’s Guardian Act, including interim reporting requirements.

Planning should take place *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 entity), identifying and assigning tasks, and determining approximate timeframes. It is good practice to identify and address any cultural issues or special needs of relevant parties, and outline how these will be addressed. It is also helpful to identify people or agencies to consult for advice about the investigation process if required, such as the Office of the Children’s Guardian, or a relevant peak body or another entity.

Ensuring procedural fairness

The Act requires heads of relevant entities to have systems in place to ensure that the handling of and response to reportable allegations has regard to the principles of procedural fairness. What procedural fairness entails may differ according to the particular circumstances of the case and the overarching paramountcy of the safety, welfare and well-being of children. However generally,

when investigating reportable allegations, the head of the relevant entity should ensure steps are taken to:

- maintain an appropriate level of confidentiality
- identify and manage any real or perceived conflicts of interest or real or apprehended bias (see Fact Sheet 5 for guidance on recognising and managing conflicts of interests)
- put the subject employee on notice (at an appropriate time) of the nature and scope of the allegations, the process that will be followed and (if relevant) that a notification has been made to the Office of the Children's Guardian
- keep the employee reasonably informed of the progress of the investigation
- conduct as timely an investigation as possible in the circumstances
- frame the allegations appropriately
- put all the allegations to the employee, with sufficient notice
- provide an option of a support person should the employee be interviewed in relation to the allegations
- explain the potential consequences of an adverse finding
- provide the employee with a genuine opportunity to respond to the allegations, in writing or at interview.

(For guidance on having regard to the principles of procedural fairness when making a finding at the conclusion of a reportable conduct investigation, see Fact Sheet 8 Making a Finding of reportable conduct.)

When to inform the employee about the allegation

The point at which the employee is told about the reportable allegation and given an opportunity to respond can be critical to the success of an investigation. It can also impact on the degree and duration of stress experienced by the employee. This step should therefore be carefully considered.

Importantly, heads of relevant entities should assess the potential risk to the investigation or any individual's health and safety before informing an employee about a reportable allegation against them. Entities should not inform the employee about the reportable allegation if doing so would compromise the investigation or put a person's health or safety at serious risk. Any decision of this kind should be documented and provided to the Guardian.

Otherwise, the employee should be advised early in the process that an allegation has been raised; that it will be investigated; the status of the response and what they can expect. It is generally not appropriate to provide the details of the allegation(s) at that stage, as it can compromise the integrity of the investigation, however it should be made clear that the allegations are reportable allegations and they have been notified to the Children's Guardian.

It is stressful for employees to learn that a reportable allegation has been made against them. It is important to reassure employees at the allegation stage that no decision has been made regarding whether or not the alleged conduct occurred; that the employee will be provided with the details of the allegation as soon as they are fully known; and they will be given an opportunity to respond to them. The employee should also be provided with appropriate support.

Informing the child who is the alleged victim, and their parent or carer

Section 57 of the Act states that heads of relevant entities who have received a report of a reportable allegation must - unless satisfied that the disclosure is not in the public interest - disclose the following information about the response to the report to the child who is the alleged victim and their parent or carer:

- information about the progress of the investigation

- information about the findings of the investigation
- information about action taken in response to the findings.

There will often be public interest reasons not to disclose information to one or more of these parties. It is important to document what, if any, information is disclosed under this provision and any public interest reasons information is not disclosed. This documentation should be provided to the Guardian. See Fact Sheet 7 Disclosing Information to Children, Parents and Carers for guidance on factors to consider when complying with section 57.

Has any part of the investigation been conducted by another agency?

In some instances, agencies such as the Department of Communities and Justice (DCJ) and/or police may have already made inquiries about a reportable allegation against an employee, including conducting interviews with the child(ren) and/or the employee.

The entity 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. In this regard, DCJ specifically guides that information may be provided under Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* “to assist an organisation to investigate [reportable] allegations against an employee”.

By securing information such as interview notes, your entity may be able to avoid re-interviewing children and other parties.

Gathering and securing information

It is important 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. Entities should ensure that these records are kept confidential and should have systems in place to deal with any breaches of confidentiality. Information relevant to your investigation can be obtained from a range of sources:

Direct evidence or information

This 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 alleged event. In some circumstances, it may be necessary to obtain information from people who have had conversations or have other information about an alleged event.

The Rules of Evidence do not apply to investigations of reportable allegations. Evidence that is inadmissible in criminal proceedings, for example, can be considered as part of your reportable conduct investigation. Therefore, even if a reportable allegation has been the subject of a criminal charge and acquittal, you should still consider any additional information gathering you may need to undertake as part of your reportable conduct response.

Physical evidence

This can be obtained, for example, by:

- collecting documents such as rosters, emails, files
- securing and inspecting objects and records including mobile telephones, computers and other digital devices, chat logs, photos and text messages
- inspecting locations to check the relative positions of parties and witnesses to the alleged incident, eg playgrounds, classrooms
- taking relevant photographs and making drawings or diagrams of the location of the alleged incident.

External sources

Information can be obtained from people who have specialised knowledge in a specific field that the general public or your entity does 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 the Department of Communities and Justice 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 4 of the *Children's Guardian Act 2019*.

If an entity has any difficulty obtaining relevant information from either the Department of Communities and Justice or NSW Police, or any other source, contact the Office of the Children's Guardian for advice.

Other issues to consider during this process

Interviews

Unless there are sound reasons not to (and any such reasons should be clearly documented in your investigation plan), advise the parent or carers of any child who is involved that an allegation has been made and/or (depending on their age and other circumstances) seek their permission to interview their child.

Interview the child who is the alleged victim (unless not appropriate) and relevant witnesses in a logical and appropriate sequence. Care must be taken in relation to whether the probative weight of the evidence obtained from the child overrides any potential trauma interviewing the child may cause – this is particularly the case if the child has already been interviewed about the allegation by another party, in which case re-interviewing the child should often be avoided.

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.

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.

As new information is obtained, review the initial assessment of risk and take further action to address concerns, if and where it is warranted.

Documentation

Document any other allegations that emerge during the investigation and what the entity did about this new information, particularly if it relates to new reportable allegations or concerns about children being at risk or the entity's child protection systems.

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 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 relevant emails.

The employee's response to the allegation

When all the relevant information has been obtained, the allegation should be formally put to the employee with as much detail as needed for the employee to have a genuine opportunity to respond to the allegation/s. The purpose and process of the investigation, the employee's rights and the role of the Office of the Children's Guardian (including the right to make a complaint about how the reportable allegation is responded to) should be clearly explained to the employee.

Best practice is to invite an employee to respond to the allegations in an interview, which enables responses to be clarified and explored in detail, where needed. Otherwise, a written response should be obtained.

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, as their presence during an interview could compromise their own evidence.

Making a finding and taking action

The investigation process should aim to gather and examine information to establish facts and make findings in relation to reportable allegations against an employee.

The Act places a number of obligations on heads of relevant entities in connection with making findings about reportable allegations. Please refer to **Fact Sheet 8 for guidance on making a finding about reportable allegations**.

Regardless of the finding about the reportable allegation, the heads of relevant entities are required to advise the Guardian of the final action they have taken, or will take, as a result of the investigation and the reasons for taking that action (or taking no action). To this end, decision-makers should clearly document their analysis of how the evidence supports their finding and how the evidence has informed their final risk assessment and decision-making around action.

The final risk assessment and action should address all identified risks, including those relating to:

- the employee – for example, consider whether the employee needs ongoing support; whether training or other remedial action is required; or if disciplinary action is warranted. Any previous relevant matters relating to the employee should be considered when deciding the appropriate action to take as a result of this investigation.
- the child or children involved – is there a need for counselling, other ongoing support or a plan managing future contact with the employee?
- any other party – for example, if the allegation is found to be false and vexatious, a decision should be made regarding what action to take, if any, in relation to this.
- organisational culture – for example, the investigation may have identified a need for improved education and awareness around child protection issues for children, employees or both.
- systems – for example, did the investigation uncover work practices, or skills gaps that contributed to the reportable allegation arising? How can these be addressed?
- policies and procedures – were existing policies and procedures able to accommodate all the issues that arose during the investigation, or could they be refined?
- risks outside of the organisation's control – the head of the relevant entity should consider whether there is a basis for releasing information about the reportable conduct matter to a *prescribed body* under Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998*.

Final advice to employee and other parties

Once the final decision is made, the employee should be informed in writing. They should also be

informed of any relevant consequences (such as that the Guardian will refer any sustained sexual offence, sexual misconduct or serious physical assault findings to its WWCC Directorate) and of any internal review or appeal options available to them.

Final advice should also be provided to the alleged victim and their parent/carer unless it is not in the public interest to do so (see *Fact Sheet 7 Disclosing Information to Children, Parents and Carers* for further guidance)

The head of the relevant entity should send the investigation report and the results of the entity investigation to the Office of the Children's Guardian. The report must also be accompanied by any copies of documents in the entity's possession that are relevant to the report, including transcripts of interviews and copies of evidence.

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, can resign, or is dismissed by the agency.

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