

Recognising and managing conflicts of interests

The NSW Reportable Conduct Scheme – Fact Sheet 5

Revised October 2025

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Under the NSW Reportable Conduct Scheme (Scheme), heads of relevant entities have a number of obligations in connection with allegations against their employees (including contractors and volunteers). These obligations are set out in the *Children's Guardian Act 2019* (the Act).

The purpose of the Scheme is to protect children by ensuring child abuse allegations (called “reportable allegations” and “reportable convictions”) are properly addressed, fostering a child safe culture and improving organisational responses to child safety concerns.

This Fact Sheet is designed to assist heads of relevant entities and their delegates to identify and managing any conflicts of interest that may present in the course of responding to reportable allegations.

Investigating Reportable Allegations

The Reportable Conduct Scheme provides a framework for the oversight of how relevant entities respond to reportable allegations that have been made against their employees.

The heads of these entities are required to have systems in place for preventing reportable conduct by employees. If a reportable allegation is made against their employee, they are required to notify the Office of the Children's Guardian (OCG), investigate the allegation and advise the OCG of the outcome and action taken.

Investigations of reportable allegations must also be conducted with regard to the principles of procedural fairness, including:

- a hearing appropriate to the circumstances (e.g. a reasonable opportunity for the employee to respond to the allegations and present their case)
- a lack of bias or partiality in the investigation and decision making
- evidence to support a decision
- inquiry into matters in dispute
- giving a person notice that a decision may affect their interests
- disclosure of critical issues to be addressed and information that is credible, relevant and significant to the issues.

What are 'conflicts of interest'?

'Conflicts of interest' refer to situations where a conflict arises between a person's official duties and their private interests, which could influence the performance of those official duties. Such conflict generally involves opposing principles or incompatible wishes or needs and can involve:

- pecuniary interests e.g. financial interests or other material benefits or costs
- non-pecuniary interests
- the interests of the employee, members of the employee's immediate family or relatives
- business partners, associates or friends
- relationships with a history of enmity or negative responses.

Assessing conflicts of interests

Investigators and decision-makers should be (and be seen to be) impartial with the capacity to perform their duties regardless of their personal and professional views and responsibilities.

Objectivity and impartiality are particularly important given the sensitive nature of reportable allegations and the serious potential outcomes for those involved. Conflicts of interest in reportable conduct investigations and decision-making could occur when an investigator's or decision-maker's personal interests or relationships do, could potentially or are reasonably perceived to influence their judgment or decision-making. Conflicts of interest erode trust in and damage the reputation of your entity, compromise investigations and result in unfair outcomes. While the independent oversight of the OCG can mitigate the potential for unfair outcomes, conflicts of interest are best managed proactively by your entity.

There are three types of conflicts of interest – actual, potential and perceived.

- An actual conflict of interest occurs when your personal interests, relationships or obligations directly compete with, or compromise, your ability to maintain professional independence or judgement. For example, an investigator assigned to examine allegations against their own family member would have an actual conflict of interest.
- A potential conflict of interest is when a conflict of interest may foreseeably arise in the future due to existing relationships, interests or circumstances that could reasonably be expected to compromise an individual's professional independence or judgement. For example, an investigator whose spouse works for the same agency being investigated may have a potential conflict of interest.
- A perceived conflict of interest arises when factors in your professional or personal life create a reasonable appearance that your decisions might be influenced by a conflicting interest, regardless of whether that conflicting interest actually exists. For example, an investigator who belongs to the same community organisation or sporting club as the subject of investigation may be perceived to have a conflict of interest. Entities can identify and manage actual, potential or reasonably perceived conflicts of interest by considering the following issues:
 - Are there any real, potential or perceived conflict of interests and, if so, what is the nature of the conflict? For example, does the investigator/decision-maker have a personal, financial or other type of relationship with the employee against whom the allegation has been made?
 - How significant is any such relationship or interest? For example, is the relationship one of simple acquaintance? Has the investigator/decision-maker worked closely with the person being investigated? Have the parties engaged in an intimate personal relationship in the past or currently?
 - Does the investigator/decision-maker hold any personal or professional biases that may lead to the conclusion that they are not an appropriate person to investigate or make decisions in the matter?
 - How serious is the alleged conduct being investigated? The more serious the allegation and potential consequences for the employee, the more important it is there is no conflicts of interest.
 - Would the investigator/decision-maker or anyone associated with them personally benefit from, or be damaged by, the investigation's finding?
 - Is the investigator/decision-maker aware of the potential for conflict? Did they volunteer information or acknowledge the potential conflict? Do they believe they can remain impartial?
 - What are the views of the alleged victim, family, and the employee who is the subject of the allegation? Do they object to the proposed investigator/decision-maker? Is the objection on reasonable grounds?
 - Is the allegation about the head of agency? What steps need to be taken to address this?

What can happen if conflicts of interest are not dealt with?

Actual, potential or reasonably perceived conflicts of interest in an investigation can have damaging and long-term effects for all concerned. For example:

- the child, the child's family or the employee who is the subject of the allegation may be less likely to be satisfied with the outcome if it is not the outcome they preferred, and may seek other redress, e.g. through legal action
- children may be at risk if an actual or potential conflict influences a favourable outcome for the employee
- the reputation of the employee may suffer if it is seen or reasonably perceived that a favourable finding was affected by investigator bias

- the investigation may require further steps to remedy the impact of the conflict, which can prolong the process and be costly
- the reputation of the entity may suffer
- there can be a loss of faith or trust by parents and/or the community generally in the entity.

What should happen when conflicts of interest are identified?

In all cases where there is, or might be seen to be, conflicts of interest, it is important to acknowledge and assess the issue, deal with it prior to an investigation commencing and carefully document the steps taken to manage any such conflict or perception.

In many large organisations (such as government departments) or entities with access to investigative units, potential or actual conflict of interest issues can be resolved effectively by appointing another investigator or decision-maker.

In smaller entities, particularly in the non-government sector, this option is not always available. It is important to recognise, however, that an investigator or decision-maker having a prior connection with the person under investigation does not automatically give rise to a conflict.

Where it is assessed that the investigator has an actual, potential or reasonably perceived conflict of interest that cannot be managed, the investigation should be assigned to another person. Where this is not possible, contact the Office of the Children's Guardian to discuss how the situation can best be resolved.

Strategies to help manage potential conflicts of interest

Some strategies that an entity may wish to consider when managing conflicts of interest include:

- disclosing the actual or potentially perceived conflict of interest – along with proposed steps to manage them – to all affected parties and obtaining their response
- allocating the investigation and decision-making responsibilities to different persons
- bringing in a third party to oversee or cross-check the investigation and/or decision
- engaging an external investigator or expert to undertake the investigation
- alerting the OCG to inform decision-making about whether it is in the public interest to monitor your investigation. As monitoring provides closer, real-time scrutiny, it may mitigate perceptions of a conflict in some cases
- entering into a cooperative arrangement with other entities so that investigators can be chosen from a 'pool' of investigators from the entities in the arrangement.

The entity's child protection/child safe policy should reflect the possibility of conflicts of interests occurring and outline the alternative arrangements that can be made in such circumstances. This information could be reinforced through training by organisations of their staff.

Office of the Children's Guardian

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