

Handling historical reportable allegations

The NSW Reportable Conduct Scheme – Fact Sheet 14

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Handling historical reportable allegations

This fact sheet provides guidance for entities in relation to handling common issues and challenges associated with the investigation of historical reportable allegations, especially when they intersect with civil-claim or redress processes. It should be read in conjunction with other OCG fact sheets.

The protection of children from harm is the paramount consideration in decision-making under the reportable conduct scheme. Related to this critical consideration is the need for responses to reportable allegations to be both trauma-informed and culturally safe. A trauma-informed response recognises that abuse, neglect and ill-treatment can cause trauma, and that the impact of trauma can be profound and lifelong. Responses to reportable allegations, including historical reportable allegations, must seek to minimise or mitigate the risk of further harm, wherever possible.

Responding to reportable allegations can be complex, and often involves balancing multiple considerations, including the right to a fair process for the person the subject of the allegation. This is particularly so where the alleged conduct is historical. A best-practice response to reportable allegations will see a relevant entity taking a sensitive approach to the planning and carrying out of an investigation, whilst also prioritising the safety of any children who may be exposed to current risk and preserving the integrity of any police or other investigation. The guidance in this factsheet,

whilst developed in consultation with numerous stakeholders, will not cover every scenario. The OCG welcomes the opportunity to discuss complex cases with you and provide tailored advice.

What do we mean by historical?

Historical reportable allegations are any matters involving disclosures that are separated in time from the alleged conduct – the separation could be years or decades. We do not seek to provide a defined timeframe for when an allegation becomes historical but instead refer to matters which have an added layer of complexity, particularly in connection with gathering and assessing relevant evidence and managing the expectations of stakeholders to the investigation process, due to the time that has elapsed since the alleged conduct. These complexities may increase, the greater the amount of time that has passed and/or the younger the alleged victim was at the time of the alleged conduct. Reportable allegations made by or on behalf of an alleged victim who is now an adult, but who was a child at the time of the alleged conduct, are some of the most challenging allegations to investigate.

Whilst we use the term “historical” to describe these allegations, we acknowledge the continuing impact of child abuse and ill-treatment upon survivors, and the ongoing trauma experienced by survivors.

This fact sheet pays particular attention to the complexities arising from historical reportable allegations that are the subject of civil claims or claims under the National Redress Scheme (NRS). A civil claim against an institution is a claim for compensation or damages for physical or psychological injury developed as a result of the institution’s alleged failure to care for and protect individuals from abuse. A civil claim can also be made against the person who is the subject of the allegation themselves if they are still alive. The NRS is a scheme to provide survivors recognition of institutional childhood abuse experienced prior to 1 July 2018 (and is open for applications until 30 June 2027).

Following the exposure given to the widespread nature of institutional forms of child sexual abuse by the Royal Commission¹ and the need for entities to respond to such matters appropriately, it is not uncommon for entities – such as religious bodies, youth justice centres, schools and/or out-of-home care providers with longer histories of operating – to receive reportable allegations involving conduct which reportedly occurred many years earlier. If the person who is the subject of allegation remains, or is alleged to remain, ‘employed’ by the entity, and the alleged conduct meets the definition of a ‘reportable allegation’, it will fall within the reportable conduct scheme regardless of how long ago the alleged conduct is said to have occurred.

Is there a current ‘employee’ who is the subject of the allegation?

The trigger to notify a matter arises when a reportable allegation pertaining to a current employee becomes known to the head of a relevant entity. This is the case in all matters – whether the disclosure is contemporaneous or historical. This enables scrutiny over, and accountability by, the entity in its response to the allegation, including the identification of the employee who is the subject of allegation.

¹ The federal Royal Commission into Institutional Child Sexual Abuse commenced in November 2012 and reported its findings in 2017.

Forming a ‘reasonable belief’ as to the identity of a subject of allegation

It is relatively common with historical allegations for the alleged victim (or other reporter) to not know or recall the name of the subject of allegation. To give effect to the protective functions of the scheme, an allegation of this type requires notification when ‘a reasonable belief’ has been formed by the Head of Relevant Entity (HRE) or their delegate, that the allegation relates to a person who is a current employee.

In order to form ‘a reasonable belief’, one must have reasonable grounds for the belief. In some instances, the entity will receive certain details about the person who is the subject of allegation, which help to form “a reasonable belief” that the person described is a current employee. In other cases, preliminary enquiries will be warranted to identify the person subject of allegation, or to narrow the field of individuals who may fit the provided characteristics.

The examples below set out fictionalised scenarios, and the types of preliminary enquiries that we would expect an entity to make to form ‘a reasonable belief’ as to whether the person subject of the allegation is a current employee.

The role held by the person subject of the allegation at the relevant time:

- ‘She was my Year 11 English teacher’ – the enrolment records held by the entity make clear the alleged victim was in Year 11 in 1995 at the relevant school, and school records show that Ms Jones was the only teacher the alleged victim had for English that year.
- ‘I was sexually abused by my male foster carer when I was in Year 7.’ The alleged victim had 4 foster care placements up to the age of 18, and two of these placements occurred in 1985 – the year of the alleged abuse – but the out-of-home care agency records show that only one of the placements involved a male and female carer. The other placement was a single female foster carer.

The physical characteristics of the person subject of the allegation:

- ‘The priest was very tall, thin, had black hair, and wore glasses’ and ‘he also used to coach our rugby team’. The records held by the entity show there were three priests attached to the church named by the alleged victim as the place where the alleged abuse took place. Photographic records indicate that two of the three priests matched the physical description, but only one was involved with coaching rugby at the school.
- ‘I don’t remember the name of the youth worker who assaulted me, but he was bald, had a tattoo on each wrist and everyone called him “Hairy”.’ A senior manager recalled an employee meeting this description and was able to name the employee.

In the above scenarios, the outcome of the preliminary enquiries would be sufficient to form a ‘reasonable belief’ and the duty to notify would therefore be triggered.

In some instances, the alleged victim or person reporting may give a name, but it does not match the available records for the period in question, however other details point towards the person the subject of allegation being another employee, or the alleged abuse having occurred at another time. This is particularly relevant where the name provided is similar in spelling, phonetics or a nickname for another worker, or when the alleged victim has a long association with the institution and nominates a time period that does not match with the named employee’s engagement. It is important to not immediately dismiss a claim on the basis that one aspect is inconsistent with available records – such as employee name or year of alleged abuse – given the impact the passage of time can have on a victim’s ability to recall such details with precision.

Further, it is imperative that all reportable allegations be approached with an open mind as to their veracity, regardless of their source or the level of detail. All reportable allegations must be responded to in an impartial, objective, evidence-based manner. If a relevant entity dismisses reportable allegations on an assumption that they lack merit, children may be at ongoing risk and

employees may be denied a procedurally fair examination of the allegations against them.

It is important to note that contemporaneous allegations which refer to an unidentified staff member are approached differently – if it is clear or implicit from the complaint or allegation received that the person referred to is a current employee, then the duty to notify under the Reportable Conduct Scheme arises even if the employee is yet to be identified.

When is information too scant to rely on to identify an employee or to constitute a reportable allegation?

Some historical allegations inviting few lines of inquiry present limited detail to identify the subject employee, and do not need to be notified under the Reportable Conduct Scheme. For example:

- A complainant alleged that he was ‘the victim of abuse perpetrated by several officers, employees or agents’ of the relevant entity thirty years earlier. The complainant was not available to provide any further details about the nature of the alleged abuse and the organisation was unable to identify any employee the subject of an allegation. We advised the entity that the threshold for a reportable conduct notification was not met.
- A claimant alleged that a youth worker referred to as ‘Banjo Bob’ sexually assaulted them twenty years earlier. A current employee named Robert Grey was identified as the possible subject employee, as he was the only person with a name that might have resulted in a nickname of ‘Bob’ who was working for the institution at the time of the alleged conduct. The organisation made inquiries with relevant personnel, who did not know anyone by the nickname ‘Banjo Bob’. Inquiries also identified that Robert Grey was often referred to as ‘Rob’. There was no other information available to suggest that ‘Banjo Bob’ was a known nickname for Robert Grey, and there was no clear allegation that ‘Banjo Bob’ was a current employee. We advised the entity that the matter did not require notification.

Further, some historical claims provide minimal details about the allegation itself. On the face of it, an allegation of having been ‘sexually abused’ meets the reportable allegation definition if other thresholds are also met and must be notified. However, without further detail (such as the person subject of the allegation’s role at the time of the alleged incident, when the incident allegedly occurred, and the circumstances surrounding it), an allegation of this type does not lend itself to investigation and it is questionable whether it is procedurally fair to deem the statement an allegation and notify the subject employee under the Reportable Conduct Scheme. Where a notification is deemed necessary, the Children’s Guardian might consider that an exemption from conducting an investigation is warranted.

‘Engaged’ and retired clergy and religious personnel

Unlike most employees covered by the reportable conduct scheme, when a member of clergy retires, this does not necessarily mean they will cease to perform all public ministry as they may, for example, be called upon to perform a funeral or wedding even if they have otherwise ceased engaging in ‘active ministry’. For this purpose, the member requires a Working with Children Check (WWCC) clearance (if the work is carried out as a religious leader or spiritual officer, and for a religious organisation where children form part of the congregation or organisation) and therefore is considered an ‘employee’ for the purposes of the Reportable Conduct Scheme.

At other times, clergy might retire and hold no intention or capacity to engage in ad hoc ministry but continue to hold a WWCC clearance. In such cases, religious bodies could engage the retired clergy in a fully informed conversation about relinquishing their WWCC clearance, which would take the retired clergy outside of the Reportable Conduct Scheme in the event that what would otherwise constitute reportable allegations are raised against them. Requests to relinquish a WWCC can be made to the WWCC Directorate of the Office of the Children’s Guardian at check@ocg.nsw.gov.au

Claims against former employees, who are known to – or may – work with children elsewhere

Historical allegations will not constitute reportable allegations when the person who is the subject of the allegations is no longer an employee of the relevant entity that becomes aware of the allegations. In these circumstances, the entity will need to respond to any associated civil or redress claim, however, will not have reporting obligations under the Reportable Conduct Scheme.

Often, a relevant entity will be aware that a former employee the subject of historical allegations is currently employed by another relevant entity. While there is no legislative obligation on the entity to disclose information about the allegation to the current employer, child protection is a collective responsibility and there is an expectation that entities will consider whether the information should be disclosed to the known current employer (see below) or to the OCG when it is believed that the person may continue to work with children but the current employer is not known to the entity in receipt of the allegation.

Allegations that have not arisen via the National Redress Scheme (NRS)

For matters that have not come to the relevant entity's attention via the NRS, consideration as to whether information about the allegation ought to be disclosed to another party should be assessed against the threshold of Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* (Chapter 16A) and, if the threshold is met, shared under that provision. If the known current employer is a prescribed body, the information can be disclosed to the current employer directly. If the known current employer is not a prescribed body and is interstate, Chapter 16A can be used to refer the information to the statutory child protection body in the relevant state.

In circumstances where the relevant entity has reason to believe – or be concerned – that the subject former employee continues to work with children elsewhere, however the details of any other child-related employment are unknown, the relevant entity should contact the OCG to discuss the circumstances of the matter.

Allegations arising via the National Redress Scheme

Allegations arising via the NRS are subject to non-disclosure provisions under the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (NRS Act). The NRS Act makes it an offence to disclose 'protected information' without authorisation as defined in the NRS Act. Section 92 of the NRS Act defines 'protected information' to include 'information about a person or an institution that was provided to, or obtained by, an officer of the scheme for the purposes of the scheme' (with the reference to 'the scheme' being a reference to the NRS).

While section 98 of the NRS Act outlines exceptions to the general non-disclosure provision, the NRS's stance is that it does not permit the disclosure of 'protected information' from one participating institution to another (including under Chapter 16A) without the approval of the NRS applicant, unless the participating institutions are members of the same participating group,² and the purpose of the disclosure is for undertaking investigation and disciplinary procedures (as per s98(2)(d) of the NRS Act). Section 98(2)(d) of the NRS Act provides for the disclosure of information by an institution to another member of the same participating group for the purpose of *either* of the

² A list of participating groups is available on the National Redress Scheme's website <https://www.nationalredress.gov.au/institutions>.

institutions undertaking an investigation. Outside of these circumstances, options available to relevant entities include:

- contacting the NRS operator to obtain the applicant's approval to disclose the information to the other employer
- where the person is working with children, advising the NRS operator about the subject person's work with children, on the basis that the operator can make a report to relevant authorities (in NSW, the NSWPF or DCJ), if it has reason to believe that children may be at risk of being abused
- regardless of whether the person works with children, making a mandatory report to the Child Protection Helpline or NSWPF, if it is reasonably necessary for the safety and wellbeing of children (permitted by section 97(2) of the NRS Act)
- providing the information to the OCG – in this regard, section 97(2) of the NRS Act enables disclosure to a government institution where it is reasonably necessary for the safety and wellbeing of children for investigatory, disciplinary or employment processes related to the safety and wellbeing of children.

Risk management action

OCG [Fact sheet 3 – Risk management](#) contains information about managing risks associated with a reportable allegation, including:

- what is risk management and who is responsible
- assessing risk
 - protecting children
 - protecting employees
- employment-related issues
- protecting the integrity of your investigation
- ongoing risk management.

When any reportable allegation is received, the entity needs to consider whether the employee should remain in their current position, be moved to another area or be suspended. In the context of historical allegations, the same principles and considerations relating to risk management apply as they would in any other matter. Risk management is the responsibility of the relevant entity. The OCG can provide guidance around the relevant principles and factors to consider and may seek further information from a relevant entity. However, when risk management appears to be inadequate or ill-informed, the OCG cannot direct an entity to take (or not take) certain action.

Generally, the relevant entity should employ the least interventionist risk management action that can address identified risks. If the employee remains in the workplace, a decision should be made about the duties that they will undertake and who will monitor and assess any risks associated with the employee having access to children in the care of the entity.

In the case of historical allegations, the length of time that has passed since the alleged conduct – particularly in the absence of known concerns since that time – may mean it is not necessary to stand the employee down from their duties if other risk mitigation strategies can deal with the risk posed or there is insufficient basis on which to assess that any current risk to children within your organisation exists.

Many entities have a practice of automatically standing down an employee who is the subject of a civil or redress claim due to a real or perceived reputational risk to the organisation. However, this is not an expectation of the OCG in the absence of evidence of unmanageable risk to children should the employee remain in the workplace. A decision to stand an employee down should also consider

the likelihood that the civil or redress claim may be protracted³ and/or that there may be no additional information about the allegation at the end of the process, as well as the factors outlined below.

Bearing in mind the impacts of a protracted investigation on a person the subject of an allegation, it is important to carefully balance evidence gathering considerations with the need to ensure the investigation is conducted expeditiously. A fair process includes taking into account the impact of delays on employees.

Factors to consider when determining whether suspension from duties is necessary

In making decisions about suspending employees, there are a range of factors that entities may wish to consider – not in isolation but together – when dealing with historical allegations to inform their decision-making, including but not limited to:

- the alleged child victim is usually an adult by the time the matter comes to light; however, risks to those children likely to have contact with the subject remain a paramount consideration when determining suitable risk management action
- the seriousness of the allegation
- whether or not police provide clearance
- whether the subject employee has previous concerns of a child protection nature raised against them
- the extent of detail provided about the alleged conduct and context
- whether details have been given about the alleged conduct that are inconsistent with existing records and this appears unrelated to imprecise recollection
- the nature of the position occupied by the employee (for example, the level of interaction they have with children) and the ability of the entity to supervise these interactions during the investigation
- for clergy and religious personnel, if they are living in a ‘closed’ or ‘cloistered’ environment, then ‘non-public’ ministry that does not involve working with children or contact with children may be able to continue, and
- community expectations, and the potential risk to the reputation and ongoing viability of an entity should they be seen as acting in a way that could be viewed as not putting the safety of children first.

It is not appropriate to prescribe when it is acceptable to keep an employee in their role as opposed to suspending or otherwise removing them from their duties, as this assessment needs to take account of all relevant evidence available at the time the decision is made by the head of the relevant entity, or their delegate. However, standing down an individual in response to a historical allegation is not an automatic requirement, and should be informed by a range of factors. All decisions regarding suspending or not suspending a person from their usual duties must be supported by a clear, documented rationale, and related risk mitigation and support strategies. As well, it is essential to remember that risk is dynamic, and the actions taken to manage risk can change during an investigation and can be eased or strengthened as the evidence emerges.

³ Civil claims take on average 12 – 24 months to negotiate (and longer if they progress to court), while redress claims take on average 6 – 12 months, however may take longer.

Obtaining clearance from police

Most historical reportable allegations involve sexual abuse, which may require referral to police for consideration as to whether a criminal investigation will be undertaken. This would particularly be the case if the subject employee works with children, or there are other circumstances giving rise to risk to children. A trauma informed response will require consideration of the alleged victim's wishes in respect of a police report. Individual matters can be discussed with the OCG.

When a matter is reported to police, the entity must place its investigation on hold until police provide advice that the reportable conduct investigation can commence or continue – this is known as “clearance”.

When a reportable allegation constitutes an alleged criminal offence, any criminal investigation into the allegation takes precedence over the reportable conduct investigation. The OCG's Fact Sheet on Reportable Conduct Investigations and the NSW Police Force should be considered in these cases.

There is an additional consideration in relation to historical allegations that are triggered by a claim under the National Redress Scheme (NRS), a statement of claim or intention to commence a civil claim process by an alleged victim's legal representative. In such cases, the entity should include the name and contact details for the alleged victim's legal representative when referring the matter to police (using the relevant [police incident notification form](#)).

The police will generally contact the nominated legal representative about whether the alleged victim wishes to make a statement or otherwise engage with police. Alternatively, police may wait for an approach to be made by the alleged victim or their legal representative, particularly when they have been advised by the relevant entity that the legal representative has been made aware of the police referral. Police generally hold the view that a person who is legally represented has sufficient agency to come forward to police if they wish to do so.

In either case, if the alleged victim does not wish to participate, or there is no engagement with police by the alleged victim or their legal representative, the case may be suspended or closed on the police system and the entity given clearance to investigate. There may be some circumstances in which Police suspend or close their investigation, but do not issue clearance to an entity to carry out their investigation.

If an alleged victim is not legally represented, police do not usually directly approach them about participating in a criminal investigation into a historical matter. In these circumstances, it is critical that when your appointed investigator is communicating with the alleged victim, they reinforce their right to engage with police first before participating in the reportable conduct investigation, and that they are made aware they can report to police at any time subsequently, but that the ability to progress a criminal investigation after a reportable conduct process or other civil process has commenced may be affected.

Clearance from the Department of Communities and Justice

In historical matters, the alleged victim may now be an adult. Nonetheless, your risk assessment should consider whether any child or ‘class of children’ (such as a group of children who may have contact with the employee who is the subject of the allegation in a specified setting) is at risk of significant harm and, if so, you should make a report to the Child Protection Helpline of the Department of Communities and Justice (DCJ). When DCJ is involved, you should liaise with the relevant casework manager about any action you intend to take, to ensure it does not compromise any statutory child protection response as is the case with police investigation processes.

When to suspend a reportable conduct investigation pending completion of civil or redress proceedings

While there is a default expectation that relevant entities will suspend their reportable conduct investigation pending clearance to proceed from police and/or DCJ, there is no similar default expectation in the case of concurrent civil proceedings. Instead, the decision regarding whether to suspend a reportable conduct investigation in these circumstances should be undertaken on a case-by-case basis. The specific circumstances of a matter can be discussed with the OCG case officer to determine whether a matter should be suspended or proceed.

Factors to consider in making this decision include:

- whether or not the alleged victim has provided an indication that they will participate in the reportable conduct investigation
- whether there is sufficient information to put to the subject employee for a response
- risks associated with proceeding with a reportable conduct investigation only for additional information to come to light through the civil or redress process, and
- whether or not the subject employee is willing to respond to the reportable allegations prior to the completion of the civil or redress proceedings, noting their right to protect themselves against self-incrimination, and the overall requirement to conduct reportable conduct investigations having regard to the principles of procedural fairness.

When to inform the employee of the allegation

Importantly, 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. An entity should not inform an employee about the reportable allegation if doing so would compromise the investigation (as noted below) or put a person's health or safety at serious risk. See [Fact Sheet 11 – Disclosing Reportable Conduct information](#) for information about when an entity must not disclose reportable conduct information to the subject employee.

In relation to historical allegations, it is not uncommon for the person who is the subject of the allegation to be an older person and/or a person who otherwise may be suffering from some form of physical or cognitive impairment. Certain professions or vocations – particularly those in which individuals are engaged beyond the usual retirement age – may be faced with the issue of when to notify an individual who may be frail or otherwise have impaired physical and/or mental health.

While for fairness reasons, it is generally critical for a person the subject of an allegation to be advised of an investigation process relating to their alleged conduct and be given a proper opportunity to respond, this does not mean they must be told about an allegation at the earliest opportunity (that is, after receiving appropriate clearance from authorities). However, when a decision has been made to stand down a person from their duties or their duties are to be changed, including receiving closer supervision, this in most cases would require the person to be informed that a reportable allegation has been received.

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 the alleged conduct occurred; that the employee will be provided with details of the allegation at an appropriate time; and they will be given an opportunity to respond to them. The employee should also be provided with appropriate support, including the option of obtaining independent legal advice, and access to an Employee Assistance Program, if this is available. Employees should also be given regular updates as to the status of the investigation. Even where there is no substantive update to provide, it is best practice to make contact with the person subject of an allegation periodically to check on their wellbeing and the adequacy of available supports, and

to provide advice as to expected timelines for the investigation – this includes a person whose employment with your entity ceases before the investigation is concluded.

How much information should be given to employee and when

OCG [Fact Sheet 4 – Planning and conducting an investigation](#) provides guidance on when and how to provide the employee who is the subject of the reportable allegation with the details of the allegation. See also [Fact Sheet 11 – Disclosing Reportable Conduct information](#) for information about when an entity must not disclose reportable conduct information to the subject employee.

In practice, when a decision has been made to stand down an employee, the employee is generally advised early in the process, but after the entity receives clearance from authorities.

It is generally then left to the appointed investigator to determine the most appropriate point in the investigation process to provide the details of the alleged conduct to the employee the subject of the allegations.

As noted previously, for employees in ill-health who are the subject of a reportable allegation and have not been stood down from their duties, there is merit in limiting the potential strain on them by reducing the amount of time between notifying them of the details of the allegation and seeking their response. This means they may not be advised of the details of the allegations until later in the process.

There are occasions when a decision not to advise a person who is the subject of allegation that an allegation has been raised against them will be reasonable, particularly if there are no lines of inquiry and minimal details for the employee to respond to. This is a case-by-case decision that should be discussed with the OCG.

It is accepted best practice that the details of a reportable allegation should not be shared with the person who is the subject of the allegation until after the investigator has had an opportunity to gather all relevant evidence, including interviewing the alleged victim and witnesses. This helps ensure that the allegations are appropriately framed, and relevant contextual details are provided to the subject of allegation to enable them to respond. While an investigator may sometimes – with reason – choose to hold back certain details until the interview with the person the subject of the allegation, the substance of the allegations should still be provided ahead of any interview or request for a written response. This approach also guards against the potential for the person the subject of the allegation to interfere with the investigation process or seek to tailor their evidence. However, the person the subject of the allegations must be given sufficient information prior to being interviewed or providing a written response to allegations to understand the nature and implications of what they are responding to.

Contact with the alleged victim or their legal representative

As noted previously, many of the historical allegations handled under the reportable conduct scheme are triggered by, or relate to, concurrent civil claim processes or circumstances involving a legal claim against an entity. In such cases, the alleged victim will likely be represented by a legal practitioner, although there are occasions when allegations come to light via other means, including through direct contact with an alleged victim, the NSW Police Force or the Department of Communities and Justice.

At an early stage of the investigation, it is important for the entity's appointed investigator to contact the alleged victim (via their legal representative) and advise them of the reportable conduct process which has been initiated, invite them to participate in the investigation process – usually this is either via written answers to questions or an interview – and when doing so, remind them of their

right to first engage with police about the alleged conduct. It is helpful to explain the reason a reportable conduct response has been initiated – that is, the subject person is the current employee of the relevant organisation and (where relevant) works with children – and what the process will entail. This enables the alleged victim to make an informed decision about whether to be involved. Where relevant, the alleged victim should also be advised that the entity has reported the allegations to police. It is advisable for these communications to be in writing or confirmed in writing following any telephone calls with the alleged victim and/or the legal representative.

As noted above, it is critical that contact with an alleged victim (or their legal representative) be considered through a trauma-informed lens. It is reasonable to anticipate that contacting the alleged victim of an historical allegation could cause them distress. Contact should therefore be made in a sensitive way, and reasonable steps should be taken to accommodate an alleged victim's wishes regarding how they are contacted, what level of involvement they have in the process and any supports they may need. The alleged victim may also need time to consider whether they would like to be involved in a reportable conduct investigation. A trauma informed response will see alleged victims' wishes respected, wherever possible. In some cases, alleged victims may feel empowered by the opportunity to participate in a reportable conduct investigation on the basis that their evidence might contribute to children being protected from harm in future. In other cases, alleged victims might choose not to participate at all.

Although entities are entitled to expect that a legal representative of the alleged victim will promptly respond to their communications regarding a statutory process involving their client, this will not always be the case. It is therefore advisable for the entity's appointed investigator to follow up with the alleged victim's legal representative about the invitation to participate in the process if a response to the initial request has not been received in a reasonable timeframe (for example, within one week). However, it should be noted that it may not be possible for the legal representative to respond within this timeframe – particularly in circumstances where the alleged victim is being held in custody and access to that person is restricted by Corrective Services protocols and policies. A longer timeframe will be appropriate in such circumstances.

In this follow up communication, the investigator should make it clear that they intend to proceed with the investigation without participation from the alleged victim if no response is received by a specified date. Again, this follow up should generally be confirmed in writing and should make clear that a lack of participation will not preclude the alleged victim from coming forward at a later time. In this regard, it must be borne in mind that there are many reasons an alleged victim may not wish to participate in a reportable conduct investigation, and that alleged victims involved in civil proceedings may be explicitly counselled against involvement by their legal representative.

There is no precise number of occasions such follow ups should occur in a matter, nor a precise length of time that should elapse before concluding that a lack of response from an alleged victim indicates an unwillingness to participate in an investigation. Instead, if the entity can demonstrate that it made reasonable efforts to contact the alleged victim via their legal representative, then it is generally appropriate to proceed without the alleged victim's participation. However, if the alleged victim (directly or via their legal representative) indicates that they would like more time to decide whether to be involved, or to be involved only after other proceedings are finalised, the relevant entity should not proceed merely because the alleged victim has not initiated further contact or is not immediately ready to participate.

Due to the information protection provisions of the NRS scheme, in matters involving NRS claims, entities will generally not have any contact details for the alleged victim. In such cases, the contact details for the alleged victim with a corresponding explanation about the reportable conduct scheme and invitation to participate should be issued via the NRS secure portal. Communications via the NRS can take additional time, and it is important to allow alleged victims, who may not be legally represented, sufficient time to consider their options. The NRS portal allows the entity (or their appointed investigator) to send follow up messages which can be passed on to the alleged victim by the NRS. Usually, an NRS officer will advise the entity that their message has been passed on to the alleged victim inviting them to make contact. If you experience delays in your communications with the NRS in a matter that you have notified to the OCG, please discuss this with your OCG contact person.

Regardless of whether an alleged victim participates in a reportable conduct investigation, if they are legally represented, they should be given information about the outcome of the investigation via their legal representative, unless it is not in the public interest to do so (see OCG [Fact Sheet 7 – Disclosing information to parents and carers](#)). It should be left to the legal representative to determine the best way to convey the outcome to them and ensure the alleged victim is appropriately supported when doing so.

If contact has been made with the entity by an alleged victim via the NRS or other means, in the absence of them being legally represented, it is recommended that you seek their advice about whether they wish to be advised of the outcome of the reportable contact process, and if so, the best way for this to be communicated, including any support needs.

Considering community expectations

It is no longer a requirement under the Act that the head of a relevant entity consider whether the reportable allegation relates to conduct that is in breach of established standards applying to the employee of the relevant entity, having regard to professional standards, codes of conduct, including any professional or ethical codes and accepted community standards.

However, these considerations are still relevant to decision-making about reportable allegations, when determining whether the thresholds for and elements of reportable conduct have been evidenced.

Prior to the commencement of the NSW Reportable Conduct Scheme in 1999, most child serving institutions in NSW had relatively unsophisticated child protection systems. Consequently, when dealing with historical allegations, it is often difficult for entities to identify and locate the relevant industry codes and standards that were operating at the time. Furthermore, when they are identified, they commonly don't include sufficient guidance regarding how employees were expected to interact with children (for example, between teachers and students).

Relevantly, the 'special care' offences contained in the *Crimes Act 1900* (NSW) did not come into force until 2003 (2020 in connection with residential care and accommodation and refuge workers). The special care offences impact on the framing of certain reportable allegations when the alleged victim is over 16 years old. In a practical sense, this can mean that reportable allegations relating to conduct that would today constitute a criminal offence under the special care provisions, may instead need to be categorised as 'sexual misconduct', and be assessed against the community expectations of the relevant time. Similar challenges can arise in relation to considering allegations relating to physical discipline, and what was considered appropriate at the time the conduct allegedly occurred. For example, 'caning' children was still an authorised practice in both government and non-government schools well into the 1980s.⁴

When considering past community standards regarding sexual misconduct (noting sexual offences are covered by relevant criminal offences) and serious physical abuse or ill treatment, entities can conduct research, make inquiries of long-standing personnel within the entity or sector, search archives for relevant records and obtain evidence on this topic directly from witnesses.

⁴ In NSW, the practice ceased in government schools in 1987, only for the banning legislation to be repealed in 1989 before the ban took effect again in 1989. Corporal punishment was banned in non-government schools in 1997.

Finalising reportable conduct matters when related civil claims remain ongoing

As previously stated, it is not expected that all reportable conduct investigations will be suspended while a civil or redress claim is underway. Indeed, it is common for the reportable conduct investigation to be completed before the civil process comes to an end. It is also common for historical matters to be settled on a 'without prejudice' basis for commercial reasons, even if an investigation process does not sustain the allegations.

If the entity has pursued all reasonable lines of inquiry available to examine the reportable allegations, and the investigation has not led to a sustained finding or the identification of any ongoing risks, the entity is not required to continue any restriction upon the duties of the person who is the subject of the allegation until the civil process comes to an end. The management of such matters will be on a case-by-case basis. In some matters, it may be appropriate for the entity to finalise its reportable conduct investigation and monitor the outcome of the civil claim process. If new facts or evidence emerges, then this must be considered in the light of other evidence already gathered and the conclusions reached, and a decision made by the entity about whether further investigation or risk management action is required. In other cases, it may be appropriate for the entity to await the outcome of the civil claim process before finalising the reportable conduct investigation. It is helpful to discuss these considerations with the OCG on a case-by-case basis.

New information arising from a civil claim process should be brought to the attention of the OCG as soon as practicable.

Relevant contacts

- OCG Reportable Conduct Directorate reportableconduct@ocg.nsw.gov.au
- [Contact Us - NSW Police](#)
- DCJ's Child Protection Helpline: 13 21 11
- National Redress Scheme: [1800 737 377](tel:1800737377)

Office of the Children's Guardian

www.ocg.nsw.gov.au

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