

Procedure – Misconduct Investigation

1. Rationale & principles for the procedure

- a. This process is designed for addressing allegations of misconduct, inside an organisation, where a formal process is required to make findings for implementation of risk management and/or disciplinary actions.

Misconduct is defined as allegations that if proven of have been more likely to have occurred than not (on the balance of probabilities), would lead to: restrictions being placed on a worker's role, or dismissal from a role or removal from a position (volunteer or paid), and may also lead to restrictions on the person's attendance or involvement in the organisation.

Misconduct includes, but is not limited to, allegations of; child abuse and neglect, sexual harassment, sexual misconduct and sexual abuse, financial impropriety, bullying behaviours, and allegations of domestic and family violence.

Workers include volunteers and paid workers in an organisation.

- b. In some instances, workers will be subject to a process from the organisation.

Where such a process exists, it is essential that this is the process implemented in place of this workplace investigation procedure.

- c. In some states and territories Reportable Conduct Legislation will apply. As the legislation has different scope and requirements in each jurisdiction, apply this process as a guide and add in any Reportable Conduct Scheme requirements. For NSW - Office of the Children's Guardian, ACT – Ombudsman, and Victoria – Children's Commission.

- d. It is recommended that this procedure be used in connection with clearly defined expectations for behaviour for workers (volunteers and paid staff), such as a code of conduct.
- e. This procedure is not designed for use where there are allegations of very minor misconduct which require only admonition and correcting worker behaviour, nor is this process appropriate for resolving conflicts or misunderstandings between parties. For instances of conflicts between parties a process focussed on restoring relationships, the procedure for responding to misunderstandings and conflicts, is recommended.
- f. For times where a worker (volunteer or paid) or an organisation member is alleged to have engaged in minor or unknown conduct, or a minor breach of a relevant code of conduct, the matter should be dealt with by the appropriate local organisation leader with a view to re-correcting behaviours.
- g. This procedure aims at working through information relating to allegations of more serious misconduct, for findings to ensure all parties are offered natural justice.
- h. This procedure is recommended for compliance with legal and insurance requirements such as but not limited to:
 - i. making findings to report to government agencies, such as Reportable Employee Conduct Schemes (NSW, ACT and Victoria);
 - ii. the Workplace Health and Safety Act which classes organisations as places of business and all volunteers as workers. Workers and visitors must be afforded safe emotional and physical environments.
- i. Case manager/s, the case response group and all organisation officer holders (for definitions of these roles, see Safe Community Framework Terminology Appendix) shall:
 - Act fairly, in good faith, without bias and in a dispassionate manner;

- Provide each party the opportunity of adequately stating their case and correcting or contradicting any relevant statement prejudicial to the person's case;
- Not receive information except as part of its information gathering and of assessment of the allegation;
- Ensure that a person called upon to answer an allegation shall be given in writing the particulars of the allegation being made;
- Ensure that each party has the opportunity to respond to further statements.

j. The matter is to be managed:

- *Without undue delay:* Acting as quickly as possible shall be a genuine recognition of the seriousness of the allegation. Care should be taken to avoid delays.
- *With clear communication:* All parties should be fully and speedily informed regarding decisions made, the reasons for the decisions and what processes are being used at all stages, particularly where there is any delay.
- *In a non-biased manner:* Disputed allegations will be investigated by persons who have no relationship (biological or other) to any party.
- *Considering conflict of interest:* Disputed allegations will be investigated by persons who have no stake in benefiting from any particular outcome of the case.
- *So that evidence-based decisions are made:* Decisions made are to be fact-based. All disputed facts will be independently investigated. All outcomes will be based on the findings of the investigation. The burden of proof shall be on the balance of probabilities.
- *With due consideration of all parties' privacy:* Every effort must be made to protect the privacy of all parties. Findings are only to be released with the permission of the Person Subject of the Allegations (PSOA) and/or the person/s bringing complaints. When preparing the case manager's report to the employer/head of Relevant Entity, the case manager will

focus on the needs of: the person bringing the complainant and any family; the PSOA and any family; and the organisation's members.

2. Procedure

1. Receipt of allegation/information relating to misconduct

- a. An allegation or information about misconduct of a worker may come in any form: phone call, email, mail, or in conversation.
- b. If the person who receives the allegation is not the relevant office holder in the organisation, it will be forwarded to the relevant office holder as soon as practical. An allegation may also be made in relation to 'information' about alleged misconduct. A senior worker/leader can make an allegation on behalf of a third party where a finding is deemed necessary for risk management purposes.
- c. In relation to sexual harassment and/or abuse the complaint may be historical (whenever or wherever occurring) or current (wherever occurring), so long as the person subject of the allegation is still attending the organisation undertaking the process.
- d. In cases relating to child abuse or neglect the matter will be managed in a child-focussed manner (see National Office for Child Safety's Complaints Handling Guide <https://pmc.gov.au/resource-centre/domestic-policy/complaint-handling-guide-upholding-rights-children-and-young-people>)

2. Triage of the allegation (classification & clarification)

The relevant organisation officer holder, such as the Safe Community Officer, or equivalent, should at this time triage the matter satisfactorily; including providing details of the process to the person bringing forward the allegation (provide documentation), discuss legal ramifications, and ensure the matter is an allegation of 'serious misconduct' against a person currently

under the jurisdiction of the local organisation.

3. Government statutory reporting and risk management measures

- a. Where the allegation is clearly of a criminal nature the relevant Office holder will report to relevant State and/or Federal Government Child Protection agencies and/or police. NB: Criminal matters are defined in the criminal codes and include but are not limited to; child abuse, acts of indecency, sexual assault, fraud, drug dealing.
- b. Reportable Conduct Scheme reporting to occur where applicable; i.e. 3 -Day notification in Victoria, 7-day notification in NSW, and 30-day notification in the ACT. Note: Reportable Conduct scheme's also have other reporting requirements, see the relevant Government website for details.
- c. At this stage a risk assessment must be undertaken by the relevant office holder/s, as to whether it is appropriate during the police investigation to ask the Person Subject to Allegation/s (PSOA), to step aside from their active duties and/or attendance at the organisation.
- d. Insurance reporting. Office holders will consider as to whether this is a matter over which the insurer should be notified or whether at this stage more formalisation is required before reporting.

4. Procedure decisions

- a. Appointment of Case Response Group (CRG) / Case Manager
 - i. If the matter, after triage, is not deemed by the head of Relevant Entity and relevant office holders of the organisation, to be a police and/or government Relevant Entity matter (child protection), or when the police/criminal justice process has concluded, the head of Relevant Entity with relevant office holders of the organisation will appoint a Case Response Group (CRG) including a Case manager. This Case Response Group (CRG) of 1-3 persons are to make binding decisions in relation to the procedure from this point forwards. The CRG will look different depending upon the nature of the allegation and the level of

leadership being accused. The CRG may in some cases be the Case Manager, or where it is deemed necessary for natural justice an external case manager.

- ii. The CRG will report to the Head of the Relevant Entity (e.g. Chair of organisation board for determination).
- b. The CRG will appoint from their group a Case Manager.
 - c. The CRG will offer support persons to all persons bringing allegations. It will be suggested that the support person is not a relative.
 - d. The CRG will at this time discuss with the Head of Relevant Entity implementation of or amendments to any risk management actions which need to be or may be already in place, dependent upon the nature of the allegations. These risk management actions are to consider the safety of all parties.
 - e. The CRG will consider the formalised allegation material and make a decision:
 - i. If the CRG in its discretion considers that the complaint is frivolous, vexatious or that further action is not necessary, the appropriate office holders may decide to dismiss the complaint, and will inform the Head of Relevant Entity of this decision who will in turn inform all parties of this decision.
 - ii. If the matter is deemed by the CRG to not be a serious matter but rather a misunderstanding/conflict or involves minor misconduct an alternative procedure may be recommended.
 - iii. If the allegations are deemed to be of a significantly serious nature and if there is enough substance in the allegations to be tested on the balance of probabilities the Case Manager will be asked to continue with this investigation procedure.

5. Investigation

- a. All witnesses being provided with an explanation of the procedure.
- b. Writing up, as a set of alleged breaches of the relevant code of conduct, legislation, or allegations of types of misconduct where a code does not apply. This document may include relevant witness statements being signed and attached.
- c. A support person will be offered to all parties by the Head of Relevant Entity. Support persons will be asked to attend all face-to-face meetings
- d. Where the matter is workplace related the PSOA will be contacted by the Head of the Relevant Entity or appointee, notifying the PSOA that allegation/s of misconduct have been received and will need to be formally investigated.
- e. The PSOA will be informed of the allegations in writing with clear instruction in relation to this procedure, and a clearly defined outline of the steps in this procedure for responding to the allegations.

The PSOA will be provided with an explanation of any risk management actions to be put in place, e.g. Interim Safety Measures in the case of sexually related matters. Where the allegations require the PSOA to step aside from duties, this will be explained. Note: At this stage these are allegations only and stepping aside is not to be seen as an expression of guilt, but rather a risk management step for all parties.

- f. The PSOA will have 21 days to write a response to the allegations.
- g. The CRG will discuss the response (can be electronically) and decide on an appropriate next step of the procedure based on the response and alert all parties (including relevant officer holders).
- h. If the PSOA acknowledges/admits the misconduct, or does not significantly deny the allegation/s or does not significantly dispute the substance allegations, the CRG consider the case and refer the matter to the Head of Relevant Entity for determination.

- i. Further investigation of significantly disputed matters
 - i. If the PSOA disputes the allegations significantly (denies the substance of the allegation/s), the matter will be considered by the CRG in terms of whether the matter should be at this point tested by them on the balance of probability or whether the matter should be referred to an external investigator for further assessment of facts on the balance of probability. The decision to appoint an external investigator will take into consideration: the type of allegations (nature and seriousness), the outcomes for the PSOA if the allegations were to be found more likely to have occurred and ability to test the allegations, i.e. credible witnesses, other corroborating facts.
 - ii. The CRG will appoint an appropriately experienced external investigator to assess the facts and to then provide a Case Report to the CRG. **NOTE:** In some jurisdictions the external case manager may be required by law to hold an investigator's licence, e.g. In NSW a CAPI licence unless the person is a lawyer.
 - iii. The Case Manager will provide the investigator with all the documents to date.
 - iv. The investigator shall arrange interviews (phone or face-to-face) with the all relevant parties, record these interviews and produce where deemed necessary transcripts of these interviews.
 - v. Under no circumstances shall there be any attempt to intimidate any party.
 - vi. No interview with a child will take place if there is a risk that this will interfere with the proper process of civil or criminal law. No interview shall be conducted with a child without the express written authority of, in the presence of the parent or guardian and only then by a person recognised as skilled practitioner in interviewing children. Special care shall also be taken in interviewing persons with an intellectual or psychiatric disability, these are to be conducted by an appropriately experienced person.
 - vii. A PSOA may be invited to admit to the alleged misconduct.
 - viii. A PSOA has the right to obtain independent legal advice at their own expense.

- ix. A written Case Report shall be given to the CRG. The investigator shall present the evidence, examine the areas of dispute and provide conclusions to the CRG as to whether the alleged behaviour is more likely to have occurred than not, based on the balance of probabilities. The investigator must provide evidence-based reasons for their conclusions. If they are unable to reach a determination based on the balance of probabilities, they may make risk management suggestions to the CRG.

6. CRG findings

- a. In undisputed matters the CRG will provide a Case Report to the Head of Relevant Entity.
- b. In disputed matters the Investigator will provide a case report to the CRG.
- c. The CRG will consider the Case Report and make a preliminary finding/s as to whether the PSOA has, on the balance of probabilities, engaged in the alleged behaviours.
- d. If the CRG preliminary determination is that the PSOA may have engaged in misconduct, it will request the PSOA provide a further written response (within 14 days) for consideration before making a final decision.
- e. Having received the PSOA's written response, and taking any further investigative measures necessary, the CRG will make their final decisions.
- f. The decision of the CRG, including reasons for the decisions, i.e. the facts, and any mitigating circumstances will be provided to the Head of the Relevant Entity. The CRG may provide the Head of Entity with recommendations as to outcomes for all parties, but shall not make the determination or carry out the outcomes. Recommendations provided by the CRG must be appropriate given all the known circumstances of the case.

7. Determination & outcomes

The Head of the Relevant Entity will take into consideration the findings of the CRG and then make determinations in relation to outcomes of the PSOA and any parties impacted by the determination, including any survivors of abuse, and other secondarily impacted persons.

Outcomes for PSOA

- a. Where the CRG finds that PSOA has not engaged in the alleged conduct, or that there is not enough evidence to make a finding, there is to be a full apology to the PSOA.
- b. Where the CRG finds that although the allegations were not proved on the balance of probabilities but that the PSOA acted in ways that were misconstrued or places him/herself in a position of high risk, then recommendations will be made to the PSOA as to how he/she can avoid future allegations.
- c. Where the CRG finds that the PSOA engaged in the alleged behaviour, it will consider possible action that might be taken in response to the breach. Actions which might be taken include; re-training, discipline, suspension, dismissal.

Outcomes relating to the person/s bringing allegations and other parties

- a. In the event that the CRG are satisfied of the truth of the complaint, and/or where there is significant emotional damage to the complainant, the appropriate office holders shall respond to the needs of the victim in such ways as are demanded by justice and compassion.

8. Right of Appeal

- a. Where the PSOA is a paid employee, the PSOA may lodge an appeal, providing reasons in writing to the Head of the Relevant Entity. The appeal will be a paper review of the procedure by a suitably-qualified person. The decision of the Head of the Relevant Entity will be final.

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Legal advice may need to be sought when responding to individual incidents.