

Annexure A: Using these guidelines

This table is for general guidance only. Each investigation must be conducted in accordance with an assessment of the merits of each complaint and the investigation tailored to suit the particular circumstances of the complaint under investigation.

	Complaint about the conduct of individuals		Complaint about policies and procedures
	Serious*	Not so serious	
Must the complaint be investigated?	Yes.	In assessing whether an investigation is warranted, consider whether there is an alternative and satisfactory means for the matter(s) to be addressed. Even if there is not, consider whether the issues raised by the complaint are too trivial to justify an investigation.	In assessing whether an investigation is warranted, consider the significance of the complaint to the agency and whether the complaint indicates the existence of a systemic problem.
Might external investigation be appropriate?	Yes. External investigation may or will be appropriate if the complaint concerns criminal conduct or serious corruption; if the matter is particularly complex or sensitive; if the subject of the complaint is the CEO or other senior member of staff; or if there are inadequate powers or expertise to conduct the investigation within the agency.	Unlikely.	Possibly. External investigation may be appropriate if the matters the subject of complaint are particularly complex and there is inadequate expertise to conduct the investigation within the agency.
Is it vital that the investigator has no conflict of interests?	Yes. The more serious the allegations the more important it is that the investigation be, and be seen to be, conducted impartially and without bias	Yes.	Yes.
Must the investigation be authorised?	Yes.	Yes.	Yes.
Are terms of reference for the investigation required?	Yes.	Yes.	Yes.
Is an investigation plan necessary?	Yes.	Yes. The less serious or complex the complaint, the less detailed the investigation plan.	Yes. The less serious or complex the complaint, the less detailed the investigation plan.
Do confidentiality requirements apply?	Yes. The obligation to maintain confidentiality is of particular importance in relation to protected disclosures.	Yes.	While confidentiality internal to the agency may not be applicable, statutory or common law (eg contractual) obligations of confidence or secrecy may apply.
Do the rules of procedural fairness apply to the investigation?	Yes.	Yes.	Procedural fairness must only be observed where an individual's rights, interests or legitimate expectations are affected.
Is it possible that the evidence collected may become forensic evidence?	Yes.	Unlikely.	No.

Investigating complaints

	Complaint about the conduct of individuals		Complaint about policies and procedures
	Serious*	Not so serious	
Do the rules of evidence apply to the investigation?	No. Subject to any legislative provisions to the contrary, the rules of evidence would generally not apply to the internal investigation into the conduct of individuals. However, if the evidence does become forensic, the rules of evidence will apply in relation to any subsequent legal proceedings.	No.	No.
Does a caution need to be administered before receiving evidence?	Only if the evidence establishes a prima facie case for a criminal offence against the person being interviewed. If this circumstance arises consider carefully whether it is appropriate to continue with any internal investigation.	No.	No.
How should oral evidence be recorded?	The more serious the allegations, the more care that is required in obtaining an accurate record of the witness's evidence. Tape recording, records of interview or witness statements are all appropriate means of recording oral evidence. The most applicable method will depend on the circumstances of the case. The degree of formality accompanying the preparation of a witness statement is directly related to the seriousness of the complaint.	Oral evidence would generally be recorded on tape or in the form of a witness statement.	Oral evidence would generally be recorded on tape, in the form of a witness statement or in a note for file.
Should third parties be entitled to be present during witness interviews as support persons?	Yes.	Yes.	No objection in principle, but since such investigations do not concern individuals the prime purpose and rationale for having a support person present is removed.
What standard of proof applies to the investigation?	Balance of probabilities. The more serious the complaint, the stronger the evidence necessary to establish the complaint on the balance of probabilities.	Balance of probabilities.	Not applicable.
What safeguards should be implemented when recording and storing information obtained during an investigation?	A paper trail of all actions taken in the investigation must be created. All relevant information should be placed on a central and secure file. Always issue receipts for property received or collected. Keep records of where, when and by whom evidence is collected. Obtain all original documents, but use copies during the investigation.	As per serious complaints. Whether or not original documents should be obtained needs to be considered in light of the degree of disruption this will entail to the operations of the agency .	As per serious complaints.

	Complaint about the conduct of individuals		Complaint about policies and procedures
	Serious*	Not so serious	
Could the complainant or investigator be liable for defamation as a result of the complaint or its investigation?	If the complaint is a protected disclosure, absolute privilege against proceedings in defamation applies to the person making the disclosure. In relation to other bona fide complaints, the defence of qualified privilege would normally apply. However, the possibility of an action in defamation is one very important reason for maintaining confidentiality during the course of an investigation.	In relation to bona fide complaints, the defence of qualified privilege would normally apply. However, the possibility of an action in defamation is one very important reason for maintaining confidentiality during the course of an investigation.	Generally not applicable.
What is the form and content required of the investigation report?	The detail required of the investigation report will depend on the seriousness of the complaint, the purposes for which the report is intended and/or who the intended audience of the report is.	The less serious the complaint, the less attention is required to be given to the detail of the investigation report.	The detail required of the investigation report will depend on the seriousness of the complaint, and who the intended audience of the report is.

* In determining the seriousness of the complaint the following factors are relevant:

- whether criminal or disciplinary proceedings may potentially arise from the investigation
- the impact or effect of the investigation on the reputation of an individual or institution
- whether it is likely to affect an individual's career prospects
- whether the report of the investigation is for the agency alone or for wider distribution or public release, and
- whether the subject matter of the complaint is notifiable (eg under the *Children (Care and Protection) Act* or the *ICAC Act*).

Annexure B: Requirements for protected disclosures

1. The allegation must have been made voluntarily

Sometimes there is confusion as to whether an allegation is made voluntarily where an agency has a code of conduct that requires employees to report corrupt conduct, waste or other misconduct to managers or supervisors. If a code of conduct requires staff to report these matters, any such report is still made voluntarily for the purposes of qualifying as a protected disclosure.

However, the situation is a little different with respect to CEOs, director-generals and GMs of local councils. Under s.11 of the *Independent Commission Against Corruption Act*, these office holders are obliged to report to the ICAC any matter that the officer suspects on reasonable grounds concerns or may concern corrupt conduct. What follows from this is that these office holders cannot, with respect to reports of suspected corrupt conduct, satisfy the requirement of 'voluntariness'.

The same principle applies to mandatory notifications of child abuse to the Department of Community Services under s.27 of the *Children and Young Persons (Care and Protection) Act 1998* or notifications of child abuse allegations made to the Ombudsman under to Part 3A of the *Ombudsman Act 1974*.

2. The allegation must have been made by a public official

Only public officials may make protected disclosures under the *Protected Disclosures Act*. Public officials are defined in s.4 of that Act as:

- persons employed under the *Public Sector Employment and Management Act 2002*
- employees of local government authorities (ie councils and county councils)
- any individual having public official functions or acting in a public official capacity, whose conduct and activities may be investigated by the:
 - NSW Ombudsman
 - ICAC
 - Auditor-General
 - Police Integrity Commission (PIC)
 - PIC Inspector.

This definition includes public servants, council employees, councillors, MPs, ministers, and police officers. From the specific terms of the Act, a protected disclosure can be made by a public official about a public authority even if the public official has never been or is no longer employed by that public authority.

It is open to question whether the protection of, and the obligations imposed by, the Act should extend to a public official where there is no obvious connection between the public official making the disclosure and the public authority or public official the subject of the disclosure. For example, public officials who make disclosures about traffic police with whom they come into contact while driving their private vehicles, or council staff who deal with the private development applications of public officials.

Another way of looking at this issue is to consider whether the connection between the person making the protected disclosure and the public authority or official the subject of a disclosure is sufficiently tenuous that the likelihood of detrimental action is so minimal as not to warrant extending the protections in the Act to the person who makes the disclosure.

While the matter is not beyond doubt, the Ombudsman prefers the view that it is not the intention of the Act to extend protection to disclosures by people of information or material of which they became aware or obtained otherwise than by virtue of the fact that they are public officials and in that capacity.

3. The allegation must have been made to one of the persons or bodies recognised by or under the Act

To be a protected disclosure, the allegation, report or complaint must have been made to one of the following:

- the CEO of the agency
- a person nominated in an internal policy or internal reporting system to receive protected disclosures, or
- one of the nominated investigating authorities under the Act which are the NSW Ombudsman, the ICAC, the Auditor-General, the Director-General of the Department of Local Government (for allegations of serious and substantial waste in local government), the PIC, or the PIC Inspector.

There are model internal reporting systems in the Ombudsman's *Protected Disclosures Guidelines* (5th edition). The guidelines also contain an extensive discussion about such systems.

4. The allegations must show or tend to show (not merely allege) corrupt conduct, maladministration or serious and substantial waste of public money

In other words, unsupported allegations may not qualify. These terms are defined in Annexure 3C.

5. The allegation was not made substantially to avoid disciplinary action

6. The allegation must not principally involve questioning the merits of government policy

7. The allegation must not include any wilful statement or attempt to mislead (a criminal offence)

8. The allegation may be anonymous

Practical tip

Assess an allegation against the following checklist to see whether it qualifies as a protected disclosure:

- it has been made voluntarily
- it has been made by a public official or former public official
- it has been made to the CEO of the agency or to a person nominated in an internal reporting system adopted by the agency to receive protected disclosures, or to the Ombudsman, ICAC or Auditor-General, PIC or PIC Inspector, or DLG (re serious and substantial waste)
- it shows or tends to show (not merely alleges) corrupt conduct, maladministration or serious and substantial waste of public money
- it was not made substantially to avoid disciplinary action.

Annexure C: Definitions of key terms in the Protected Disclosures Act 1994

Maladministration

Maladministration is an umbrella-like term covering many different types of conduct. For the purposes of the Act, maladministration is defined as conduct that involves action or inaction of a serious nature, that is:

Contrary to law

- Decisions or actions contrary to:
 - an Act or Regulation
 - the common law
 - a lawful and reasonable order from a person or body authorised to make such an order
- Failure to comply with:
 - obligations under an Act or Regulation
 - the common law
 - a legally binding document or contract
- Continuation of practices or procedures which the courts have found to be unlawful
- Decisions or actions ultra vires, ie not authorised (the decision-maker had no power to make the decision or to do the act)
- Breach of natural justice/procedural fairness, including:
 - failure to give or inadequate notice
 - failure to give or inadequate opportunity to be heard
 - bias
- Incorrect
 - interpretation of the law
 - application of the law
- Legal requirements or procedures not observed
- Improper exercise of a delegated power:
 - decision or action not authorised by delegation
 - fettered discretion/acting under the direction or at the behest of another, ie acting under 'dictation'
- Criminal or corrupt conduct
- Decisions or actions induced or affected by fraud
- Acceptance of bribes or secret commissions
- Unauthorised disclosure of confidential/secret/private information
- Breach of trust or fiduciary responsibilities

Unreasonable

- Decisions or actions:
 - inconsistent with adopted guidelines or policy and that inconsistency is not adequately explained
 - inconsistent with other decisions or actions which involve similar facts or circumstances

- made or taken without obvious relationship to the facts or circumstances
- not justified by any evidence
- partial, unfair or inequitable
- made or taken by a person with a conflict of interests
- arbitrary
- so unreasonable that no reasonable person could so decide or act (ie irrational)
- unconscionable
- based on information that is factually in error or misinterpreted
- unreasonably delayed
- Inconsistent decisions or actions not adequately explained
- Policy applied inflexibly without regard to the merits of individual cases
- Application of procedure which fails to achieve the purpose for which it is intended
- Relevant considerations not adequately taken into account
- Irrelevant considerations taken into account
- Important facts omitted from reports or deliberations, or ignored
- Denial of procedural fairness, including inadequate:
 - notice of proposed action, decision or hearing
 - advice as to rights
 - reasons for decisions or actions
 - consultation
 - opportunity to be heard
- Failure to give notice of rights where reasonable to do so
- Wrong, inaccurate or misleading advice leading to detriment, whether inadvertent or deliberate
- Failure to apply an Act, Regulation or the common law
- Means used not reasonably proportional to ends to be achieved (ie excessive use of authority) including restraints imposed upon people or property that are not necessary to preserve and protect rights of others
- Abuse of power, eg use of power for unauthorised purpose
- Failure to rectify identified mistakes, errors, oversights or improprieties
- Failure to appreciate impact on the public or an individual, or giving undue weight to agency's convenience, interests.
- Failure to properly comprehend complaint or to respond appropriately to complaint
- Breach of trust
- Failure to properly investigate
- Negligence or the absence of proper care and attention.

Unjust (s.26(1)(b))

- Decisions or actions:
 - not justified by any evidence
 - partial, unfair or inequitable
 - made or taken by a person with a conflict of interests
 - arbitrary
 - so unreasonable that no reasonable person could so decide or act (ie irrational)
 - unconscionable
- Refusal of otherwise valid claims based on minor procedural defects
- Means used not reasonably proportional to ends to be achieved (ie excessive use of authority)

Investigating complaints

- Abuse of power
- Negligence or the absence of proper care and attention
- Unfair or inequitable application of law so that burden or benefit does not reach all those to whom it is intended to apply

Oppressive

- Decisions or actions:
 - unconscionable
 - punitive, harsh, cruel or offensive
- Means used not reasonably proportional to ends to be achieved (ie excessive use of authority)
- Abuse of power/discretionary authority
- Imposition of unreasonable preconditions to the provision of a legal entitlement
- Intimidation or harassment
- Use of superior position or knowledge to place a person at an unreasonable disadvantage or to obtain compliance with wishes in respect of an otherwise unrelated matter

Improperly discriminatory

- Inconsistent application of laws, policies, etc. when there is no reasonable, justifiable or appropriate reason to do so
- Inconsistent application of policies or practices
- Distinctions applied not authorised by law, or failure to make a distinction which is authorised or required by law
- Failure to perform duties impartially and equitably

Improper motives

- Decisions or actions:
 - for a purpose other than that for which the power was conferred, ie the intent of a law, policy or procedure is ignored or disregarded in order to achieve a particular outcome
 - motivated by favouritism or personal animosity
 - for personal advantage
 - made or taken by a person with a conflict of interests
- Misuse of confidential information to obtain improper advantage
- Bad faith
- Dishonesty
- Seeking or accepting gifts or benefits in connection with the performance of official duties.
- Misuse of public property, official services or facilities
- Favouritism or promotion of personal objectives other than those which merit and equity dictate.

Corrupt conduct

Corruption is defined in the ICAC Act in broad terms to include:

- the dishonest or partial exercise of official functions by a public official
- conduct of a person when it adversely affects the impartial or honest exercise of official functions by a public official.

For the ICAC to become involved, generally speaking, the disclosure will concern conduct which could constitute or involve:

- a criminal offence
- a disciplinary offence, or

- be reasonable grounds for dismissal.

Corruption can take many forms. Taking or offering bribes, public officials dishonestly using influence, blackmail, fraud, election bribery and illegal gambling are just some examples. Some examples of corrupt behaviour include:

- a public official accepts money from a company in payment for choosing that company to do a job for the government agency
- a public official uses public resources for private purposes
- the police let a driver who is 'over the limit' go because he is a well known sportsman.

Serious and substantial waste

Serious and substantial waste refers to the uneconomical, inefficient or ineffective use of resources, authorised and unauthorised, which results in a loss or wastage of public funds or resources.

In addressing any complaint of serious and substantial waste, the Auditor-General has advised that regard will be had to the nature and materiality of the waste.

Types of waste:

- absolute – the value of the waste is regarded as significant
- systemic – the waste indicates a pattern which results from a system weakness within an authority
- material – the waste is material in terms of:
 - the authority's overall expenditure
 - a particular type of expenditure
- affects an authority's capacity to perform its primary functions.
- material by nature, not amount:
 - the waste may not be material in financial terms but may be significant by nature ie it may be improper or inappropriate.

'Shows or tends to show'

To be protected, a disclosure must disclose information which 'shows or tends to show' certain things. To comply with this requirement it is most likely that it is necessary to do more than merely allege.

Matters must be stated which, if substantiated, amount to the relevant conduct, or tend to do so. It is necessary to assess the supporting material provided with a disclosure to determine its adequacy for the purpose of the Act before a decision is made as to whether it appears that a disclosure is protected.

If the disclosure appears to satisfy the above criteria, then the complaint and allegations should be treated as a protected disclosure.

Evidentiary requirements must be considered. Therefore, every effort should be made to get the disclosure in written form even if the investigator has to transcribe it and get the complainant to sign it. This reduces the chance of subsequent disputes about the precise nature of the disclosure and whether it should have been treated as protected.

Annexure D: Avoiding errors in handling protected disclosure

The following organisational errors in the management of whistleblower disclosures occur more often than many may think and can have serious consequences. They have the potential to effectively contaminate the relationship between the whistleblower and the investigating authority and prejudice the integrity of any investigation.

The errors include:

- failing to observe the confidentiality of a disclosure by having information pass through a series of hands with few checks as to who has, or who should, view the material
- telling anyone who asks about the details and investigation of the disclosure
- reporting to the work group who the whistleblower is, what the allegations are, and who they are about
- interpreting procedural fairness to mean that a person has an immediate right to know when a disclosure has been made about them and who made it
- always as a first step, asking the subject officer about the allegation
- forwarding the disclosure and action on it through the chain of command so that as many people know about the matter as possible
- forewarning the person who is the subject of an allegation in plenty of time about the allegations and providing them with investigation details
- allowing personal biases about the personality of the whistleblower to influence the assessment of a disclosure
- not taking seriously the concerns expressed by a whistleblower about the possibility of reprisal
- ignoring potential conflict of interests when deciding who should assess or investigate the disclosure
- allowing political considerations to influence the assessment of a disclosure or the findings of an investigation
- delaying the investigation for as long as possible so that any evidence of wrongdoing can be altered or destroyed.

Source: Anderson, P., Manager Whistleblower Support Program, Queensland Criminal Justice Commission, Investigation Techniques Conference, Sydney, 26 June 1996.

Annexure E: Public Sector Agencies Fact Sheet No. 3: Conflict of Interests

Public Sector Agencies fact sheet No 3



NSW Ombudsman

Conflict of Interests

Public officials should avoid situations in which their private interests conflict or might reasonably be perceived to conflict with the impartial fulfilment of their official duties and the public interest. Public officials should not allow the pursuit of private interests to interfere with the proper discharge of their public duties.

The meaning of the term 'conflict of interests'

The term 'conflict of interests' refers to situations where a conflict arises between public duty and private interest which could influence the performance of official duties and responsibilities. Such conflict generally involves opposing principles or incompatible wishes or needs.

Conflict of interests can involve pecuniary interests (ie, financial interests or other material benefits or costs) or non-pecuniary interests. They can involve the interests of the public official, members of the official's immediate family or relatives (where these interests are known), business partners or associates, or friends. Enmity as well as friendship can give rise to an actual or perceived conflict of interests.

Conflict of duties

A distinction can be drawn between 'conflict of interests' involving actual, potential or reasonably perceived conflicts between public duty and private interests, and 'conflict of duties' involving a conflict between competing or incompatible public duties.

In some circumstances a conflict of duties is acceptable, or at least unavoidable, for example where the holding of one public sector position or office is the prerequisite or qualification for the holding of another position or office.

In most other circumstances, as a matter of principle a conflict of duties is either unacceptable and to be avoided, or at the least a problem to be disclosed and carefully managed. These circumstances would include where a public official holds positions in or otherwise performs duties for more than one public sector agency:

- where those agencies have interests or objectives that are, or are likely to be, competing or incompatible

- where issues concerning one agency or position are, or are likely to be, considered or decided by the other agency or the holder of the other position, and such consideration or decision-making is required to be impartial, or
- where the activities of one agency are, or are likely to be, regulated or subject to review or oversight by the other agency.

Where conflict of interests can arise

Sometimes, by virtue of their public official status, position, functions or duties, public officials have the power to make decisions or act in ways that can further their own private interests (eg, to gain financial or other benefit for themselves, their immediate family, relatives, business associates or friends). This may cause a real or reasonably perceived conflict between the public official's private interests and the public interest.

It matters little whether a conflict of interests is actual or merely a conflict that could be reasonably perceived to exist by a third party. Both circumstances negatively impact on public confidence in the integrity of the system.

A real or reasonably perceived conflict may exist even if a public official is not the ultimate decision-maker. For example, it may be that as a result of the official's conflict of interests, there had been a failure to collect all relevant facts or ask the necessary questions, or otherwise to carry out a proper investigation or assessment of the facts on which the ultimate decision was based.

It is not always easy to identify a conflict of interests. Human nature being what it is, if a person has, or has the potential to have, a personal or otherwise private interest in a matter, it is unlikely to be in the person's interests to recognise or identify the existence of such a conflict if this would preclude them from further involvement in the matter.

It is sometimes unrealistic or even undesirable to expect that the official dealing with a matter will be someone having no prior connection with the person or issues concerned. Some matters may have significant histories that involve the same members of the public and the same agency staff. Simple acquaintance with a person concerned, or the fact that an official has previously had official dealings with that person, is not sufficient in itself to indicate that the official has a real or reasonably perceived conflict. There must be something more, or something particular to the matter in question.

Disclosure of conflict of interests

Decision-makers, and people advising or reporting to decision-makers, should promptly, fully and appropriately disclose any actual or potential conflict of interests they may have in a matter under consideration. Where this conflict involves the interests of a public official's family or friends, those interests should be disclosed to the extent they are known to the public official.

Public officials should also bring to notice any circumstances that could result in a third party reasonably perceiving a conflict of interests to exist (ie wherever a reasonable person could perceive that an official may not bring an impartial and unprejudiced mind to the making of a decision due to an actual or perceived conflict of interest or bias).

Such disclosures must be made at the first available opportunity to an appropriate senior officer of the agency for a decision as to what action should be taken to avoid or deal with the conflict.

Issues to be considered in assessing whether there is a conflict of interests

In assessing whether a public official has an actual, potential or reasonably perceived conflict of interests, it may be helpful to ask the following questions:

- How serious is the matter and does it directly impact on the rights or interests of any person or of the general public?
- Does the official have a current or previous personal, professional or financial relationship with an interested party and if so, how significant is or was the relationship (eg, is the relationship one of simple acquaintance, previous work experience, close friendship, business partnership)?
- Would the official or anyone associated with the official benefit from or be detrimentally affected by a decision or finding in favour of, or adverse to, any interested party?
- What does any relevant code of conduct require in relation to conflict of interests?

Options to avoid or deal with a conflict of interests

Where a disclosure of an actual, potential or reasonably perceived conflict of interests (including a pecuniary interest) is made to an appropriate officer, depending on the circumstances of the case, the options available include:

- taking no further action because the potential for conflict is minimal or can be eliminated by disclosure or effective supervision
- informing likely affected persons that a disclosure has been made, giving details and the agency's view that there is no actual conflict or the potential for conflict is minimal
- appointing a 'probity auditor', or independent third party to review or oversight the integrity of the process/decision (this will be particularly appropriate where there is a reasonably perceived – but not actual – conflict of interests or the conflict is only identified at or near the conclusion of the process or after the making of the decision)

- appointing further persons to a panel/committee/team to minimise the actual or perceived influence or involvement of the person with the actual or reasonably perceived conflict
- where the persons likely to be concerned about a potential, actual or reasonably perceived conflict are identifiable, seeking their views as to whether they object to the person having any, or any further, involvement in the matter
- restricting the access of the person to relevant information that is sensitive, confidential or secret
- directing the person to cease supporting a third party whose actions may conflict with the agency's interests (for example a person or organisation taking legal proceedings against the agency)
- requesting the person to relinquish or divest the personal interest which creates the 'conflict' (where the position of such an interest is not prescribed as a qualification for the person's official position)
- requesting the person to make arrangements for the relevant private interest to be held and managed in a 'blind' trust
- removing the person from duties or from responsibility to make decisions in relation to which the 'conflict' arises and reallocating those duties to another officer (who is not supervised by the person with the 'conflict')
- transferring the person to some other area of work within the agency, or some other task or project
- transferring the person to some other agency
- persons with a 'conflict' who are members of boards, committees or councils absencing themselves from or not taking part in any debate or voting on the issue
- in serious cases, requesting or directing the person to resign, or terminating the person's employment or appointment (having complied with the rules or procedural fairness).

For further information on this and related topics see *Good Conduct and Administrative Practice* (2nd edition) NSW Ombudsman, June 2003.

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Telephone Interpreter Service (TIS): 131450
We can arrange an interpreter through TIS or you can contact TIS yourself before speaking to us.

Annexure F: Checklist for a good investigation

Part 1 – Receipt and assessment	Yes	No	n/a
1. Was there a prompt response to the allegation?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Comment			
2. Was the complaint properly documented?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Comment			
3. Was an assessment conducted?			
3.1 Did it determine the issues, and if so what action should be taken?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3.2 Was the preservation of evidence considered?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3.3 Were the rights of the person the subject of the allegation considered?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3.4 Was a risk assessment carried out?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3.5 Was the safety and welfare of all people considered (if applicable)?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Comment			
4. Were the appropriate mandatory notifications made (if applicable)?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Comment			
Part 2 – Preparing for the investigation			
5. Investigators			
5.1 Was the investigator qualified for the tasks?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5.2 Did the investigator have sufficient authority to deal with the matter?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5.3 Were there sufficient resources to undertake the investigation?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5.4 Were the investigators independent of the allegations?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5.5 Were there any conflict of interests?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Comment			
6. Plan of action/Investigation plan			
6.1 Was there any contingency plan/investigation plan in place to deal with allegations?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6.2 If yes, was that plan utilised?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6.3 Did the plan include terms of reference or objectives?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6.4 Did the plan set definite time limits for stages of the investigation?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Comment			
7. Confidentiality			
7.1 Was confidentiality maintained with respect to notifier (if practical)?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7.2 Was confidentiality maintained with respect to the person the subject of the allegation?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7.3 Was the matter a protected disclosure?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
- If so, were the appropriate steps taken to ensure confidentiality?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7.4 Was confidentiality maintained with respect to child (if practical and applicable)?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Comment			

Part 3 – The investigation

	Yes	No	n/a
8. Information gathering			
8.1 Was all information obtained and considered?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8.2 Was the information obtained considered in an objective way?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8.3 Was all culpatory/exculpatory evidence considered?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8.4 Were all possible witnesses interviewed?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8.5 Were statements obtained?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
- If so, were they properly recorded?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8.6 Was expert opinion/advice sought (if relevant)?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8.7 Were interviews conducted fairly and legally?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8.8 Were interviews properly recorded?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8.9 Were the rules of evidence adhered to (if applicable)?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8.10 Was the investigation properly recorded?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8.11 Were all the relevant documents collected?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8.12 Was the chain of possession of the documents assured?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8.13 Was all relevant physical and documentary evidence obtained, recorded and secured?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8.14 Were background checks conducted on the person subject of the allegation (if applicable)?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Comment

Part 4 – Procedural fairness

9. Employees' rights			
9.1 Was the person the subject of the allegations given an opportunity to make submissions?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9.2 Were any submissions, made by the person the subject of the allegation, properly considered?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9.3 Were the submissions of the person the subject of the allegations properly recorded?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9.4 Was the person the subject of the allegations informed of substance of the adverse comment proposed to be made?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9.5 Were any submissions received properly considered?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9.6 Was consideration given to issuing a caution to the person (if relevant)?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Comment

Part 5 – Related issues

10. Industrial relations issues			
10.1 Was information on the investigation process given to all affected people?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10.2 Were any administrative actions legally available (if applicable)?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10.3 Were the disciplinary procedures for the agency adhered to?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10.4 Were any criminal offences and/or corruption identified?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
- If yes, were the appropriate authorities notified?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
- Was the standard of proof applied to the matter appropriate?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Comment

Part 6 – The conclusion

	Yes	No	n/a
11. Concluding the investigation			
11.1 Did the investigation reveal any systemic failures or issues that require correction?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
11.2 Did the investigation reveal other matters, which require investigation or action?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
11.3 Were referrals to other agencies complete, timely and appropriate?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
11.4 Were the investigation findings documented?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
11.5 Are the findings justifiable from the investigation?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
11.6 Should further findings have been made?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
11.7 Were recommendations made?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
11.8 Were the recommendations comprehensive and adequate?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
11.9 Have all parties entitled to know, been given the findings and recommendations?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
11.10 Have the findings and recommendations been acted upon?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Comment

Annexure G: Fact sheets to assist agencies conducting investigations into child protection matters

These fact sheets are 'help' sheets to assist agencies when faced with a child protection matter involving an employee. They are not comprehensive, and agencies should seek advice when in any doubt about how to proceed:

- Fact Sheet No. 1 Keeping records
- Fact Sheet No. 2 How we assess an investigation
- Fact Sheet No. 3 Planning an investigation
- Fact Sheet No. 4 Conducting an investigation
- Fact Sheet No. 7 Recognising and managing conflict of interest
- Fact Sheet No. 9 Risk management following an allegation of child abuse against an employee

1 Child protection fact sheet No 1



NSW Ombudsman

Keeping records

Good record keeping assists in improving accountability and provides transparent decision making. This simple help' sheet is intended to assist agencies. It is not comprehensive and agencies should ensure their record keeping meets any relevant legislative requirements.

What we will look for

Documentation of the following:

- the allegation (a brief summary of what has been said and by whom)
- any initial response you provided to the person making the allegation, the alleged victim(s) and the subject of the allegation
- a plan detailing how the investigation is to be carried out, including whether the Department of Community Services/Police need to be notified
- your interim risk assessment, including any interim management arrangements/decisions made about the employee and the rationale/support and/or counseling for the child or employee
- any interviews conducted, including details of who is being interviewed, any other people present, the name and position of the interviewer, and the date of the interview
- records or notes from interviews:
 - this should include details of questions and responses, and be signed by the interviewee
- any decisions made, during and at the conclusion of the investigation, including their rationale, the position and name of the person making the decision and the date
- any contact/discussions/e-mails with anyone about the matter:
 - this should include the date, the discussion/questions/advice/outcome, the name of the person making contact, details of their position/agency and where appropriate reason for the contact

- a summary report that details the allegation, the investigation process, the final determination (including the reason), the final risk assessment (which includes any final decision about the employee and the factors that have been considered) and any subsequent action that is to be/has been taken.

We will also expect that you will:

- advise the employee of the final determination in writing
- have an organised information management system:
 - for example all the documents should be kept together in a file and readily located
- have records in a safe and secure place.

General points to remember

- Clearly record the initial allegation(s)
- Document your planning process
- Ensure all records are legible, signed and dated
- Avoid subjective language
- Include all notes (however rough) in the file
- Document all decisions (and their rationale)
- Document all advice (both given and received)
- Issue clear guidelines for staff about record keeping
- Document all discussions and place on file (includes copies of all e-mails)
- Keep records in a safe and secure place for the required period

Tip

If you want to objectively examine your own record keeping before we do, then ask yourself:

If someone needed to read my investigation file in ten years time, would they be able to understand at a glance the process I used in my investigation, what decision I reached, my rationale and the action I subsequently took?

Common faults in record keeping

The following information is often not adequately recorded:

- ☒ Initial report/complaint of allegation(s)
- ☒ The process of planning prior to the investigation
- ☒ The assessment of risk posed by the employee (subject of allegation) and action taken
- ☒ Discussions/inquiries relating to the investigation
- ☒ Any action taken with child and employee, eg counselling
- ☒ Decisions made during the investigation (including decisions not to do something, eg a decision not to interview the child).

The standard of investigations is often difficult to assess due to:

- ☒ Insufficient details from interviews conducted with child/employee/any other witnesses
- ☒ Records that are illegible, undated and/or unsigned
- ☒ Insufficient or unclear information about the findings of the investigation (including their rationale)
- ☒ There is no letter to the employee stating the outcome.

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Child protection fact sheet No 2



NSW Ombudsman

How we assess an investigation

This simple help sheet is intended to assist agencies investigating allegations of child abuse against employees. It is not comprehensive and agencies should seek advice when in any doubt about how to proceed.

What we will look for

Below are the major features we will be looking for when we assess your response to a child abuse allegation:

- Was the immediate safety of children considered:
 - When the allegation was first made?
 - During the investigation?
 - At the conclusion of the investigation?
- Has appropriate assistance such as counselling, union referrals and management support, been offered, where necessary, for the child (and family), the employee and other parties as warranted?
- Was the overall response by your agency to the allegation prompt and timely?
- Was the allegation clearly defined and treated seriously?
- Was there an adequate investigation plan?
- Were all the relevant people and witnesses approached to give information/evidence (interviews, statements, etc)?
- Should the child have been interviewed directly or was that evidence better obtained from other sources when the child had already been interviewed?
- Was the child appropriately interviewed and that evidence adequately documented?
- Was the employee the subject of the allegation(s) interviewed and given an adequate chance to respond?
- Was all relevant evidence collected and considered?
- Were parents/carers adequately and promptly informed and involved at all appropriate stages?
- Were the necessary reports made internally, and externally to the Department of Community Services (DoCS), Police, Ombudsman, etc?

- Has everything been documented? (ie phone calls, email, meetings, conversations, decisions, etc)
- Has confidentiality been respected?
- Was the finding reasonable given the evidence?
- Has appropriate action been taken as a result of the finding?
- Have policies/procedures been adhered to?
- Is the process transparent and accountable?

General points to remember

- safety of children paramount
- natural justice and procedural fairness for employee
- clear procedures and policies
- no conflict of interest or bias
- proper investigation plan and logical structure
- thorough documentation and record keeping
- all relevant evidence collected
- all relevant evidence considered
- consultation with relevant bodies (eg Associations, DoCS, Police, Ombudsman, Unions, legal, etc)
- confidentiality
- appropriate policies and procedures that deal with workplace child protection issues should be in place.

Tip

If you want to objectively examine your own investigation before we do, then ask yourself these questions

If it were my child subject of the alleged abuse, would I be satisfied with the process?

If I were the employee subject of the allegation, would I be satisfied with the process?

If I were a concerned member of the public, would I be satisfied with the agency's process?

Common faults

Some common faults in investigations are:

- failure to plan the investigation
- inadequate documentation
- all relevant witnesses not interviewed
- all relevant information/evidence not assessed or collected for assessment
- witness statements illegible, unsigned, undated
- lack of risk assessment throughout
- investigation documents disorganised
- findings do not flow from the evidence
- conflict of interest/bias for investigator/key decision-maker
- inappropriate interviewing of child
- confidentiality breached
- possible medical evidence not sought
- decisions and rationales not documented and decisions made before all evidence collected

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Child protection fact sheet No 3



NSW Ombudsman

Planning an investigation

This document is intended to be a simple 'help' sheet to assist agencies. It is not comprehensive and agencies should seek advice when in any doubt about how to proceed.

It is essential to spend some time before commencing an investigation planning the action to be taken and documenting any decisions that are made. This focuses your efforts, identifies the information you need to obtain and reduces the chance of overlooking information or duplicating the action taken.

One way of documenting these decisions is to write an Investigation Plan. This is a record of what you intend to do to carry out the investigation, why you are doing it, how it is to be done, and when it needs to be done. This can be a formal, typewritten document or simply notes in your file that address these points.

What we will look for

The planning process should include the following stages:

- summarise the information provided about allegations so you are clear about what has been alleged:
 - for example, an allegation of child abuse may be described as 'teacher X hit child Y across the face with an open hand'
- consider what your objectives or terms of reference are: that is, the purpose of, or what you hope to achieve, by investigating the allegations
- identify the information you need to gather in order to achieve your objectives
- determine the action that needs to be taken to gather this information, and determine a timeframe for these tasks
- anticipate possible problems and plan for them
- consider the available resources and prioritise tasks according to their urgency and the resources available

- document the decisions made; particularly when you decide not to do something
- allocate tasks.

Investigation process

1. Begin your investigation.
2. Make any necessary preliminary enquiries. For example, consult relevant people about procedures or clarify initial information.
3. Review the investigation plan during the investigation to ensure that you are achieving your objectives.
4. As part of the investigation you may need to conduct interviews (including the alleged victim, any relevant witnesses and the person who is the subject of the allegations), gather statements, undertake site visits, gather physical evidence (eg photographs), consult relevant experts, review relevant policies, and review documents/ records.
5. Once all information has been gathered, review the relevant facts and formulate your findings.
6. Write a report summarising your investigation, your findings and any recommendations you may have.
7. Consider and act on the requirements of procedural fairness
8. It is good practice for information gathering/ report writing and decision-making to be separate functions if possible. If appropriate, provide your final report to the person responsible for the final decision-making.
9. Undertake any required action to finalise the investigation (eg advise all relevant parties of the outcome, finalise documentation).

General points to remember

- ☑ Ensure that you have spent some time planning what you are going to do before taking action.
- ☑ Know what your authority is and the powers that you have.
- ☑ Ensure that the investigator is adequately trained.
- ☑ Ensure adequate resources are allocated to the investigation.
- ☑ Record all of the action taken and decisions made.

Common faults

Some common faults in investigations are:

- ☒ Failure to plan the investigation, particularly to set out objectives, and to define the allegations.
- ☒ Appropriate advice is not sought from relevant agencies regarding the action to be taken (eg DoCS, legal services).
- ☒ Failure to provide procedural fairness to persons the subject of investigation or adverse comment.
- ☒ Decisions are not documented.
- ☒ All available evidence is not gathered and documented.

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4

Child protection
fact sheet No 4



NSW Ombudsman

Conducting an investigation

This document is intended to be a simple 'help' sheet to assist agencies. It is not comprehensive and agencies should seek advice when in any doubt about to how to proceed.

STAGE	KEY ISSUES TO CONSIDER
Initial response	<ul style="list-style-type: none"> • Clarify the allegation. Exactly what has been alleged? Who, What, When, Where? • If it is a matter that needs to be reported to the Department of Community Services (DoCS), decide who is going to do this. • Assess any risks posed by the employee to children in the agency's care. Take any necessary interim action to ensure the safety and wellbeing of the children. • Address any support needs of both the child and the employee who is the subject of the allegation. • Identify all the people you consider should be consulted or who might provide relevant information, including witnesses (if any).
Planning	<ul style="list-style-type: none"> • Decide whether to interview the child (or children). When DoCS or the Police are involved, consult with them before interviewing the child or the employee who is the subject of the allegation. Interviews of children should only be carried out when DoCS or the police are no longer involved and then preferably by trained interviewers. • Document your investigation plan (refer to NSW Ombudsman child protection fact sheets No 2 'How we assess an investigation' and No 3 'Planning an investigation').
Information gathering	<ul style="list-style-type: none"> • Collect sufficient relevant documentary evidence (eg medical reports, roster schedules etc) and information to assist you in your decision making. • Interview the child (if appropriate) and all relevant witnesses. Ensure all interviews are adequately recorded (eg taped and summarised, or close to a verbatim record written during the interview). Where possible, ensure records are signed and dated by all involved. • Review your initial risk assessment and take any further action to address concerns, if warranted.



STAGE	KEY ISSUES TO CONSIDER
Employee response	When you have obtained all the relevant evidence, put the allegation to the employee at an interview and give them the opportunity to respond, both during the interview, and if they wish, in a written submission.
Making a finding	<ul style="list-style-type: none"> • Consider all the information gathered. • Make a finding, based on the information gathered, as to whether, on the balance of probability, the allegation is sustained or not sustained. The rationale behind the finding should be clearly documented. Ideally, the person making this decision should be separate to the investigator.
Taking action	Make a decision about what subsequent action to take, if any, as a result of the investigation, including possible disciplinary action, amendments to policy and/or procedures, and a final review of risk.

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7 Child protection fact sheet No 7



NSW Ombudsman

Recognising and managing conflict of interest

Ideas about how to deal with conflict of interest in the investigation of child abuse allegations.

What does 'conflict of interest' mean?

'Conflict of interest' refers to situations where a conflict (clash) arises between duty (position) and self interest (person). Such conflicts generally involve opposing principles, or incompatible wishes or needs, which are based upon a family or close relationship, or feelings of hostility towards another person.

Why is it important in investigations?

As a rule, it is important for investigators to be objective and impartial, and to be perceived as such. One factor that can affect an investigator's neutrality is a conflict of interest between their role as an investigator and other personal or professional views or responsibilities.

Personal views or private interests can influence and compromise a person's capacity to perform their duties. Given the sensitive nature of child abuse allegations, and the serious potential outcomes for those involved, the need for objectivity and impartiality is particularly important.

What should happen when a conflict of interest is identified?

Ideally this means that investigators and/or any person deciding matters who has a conflict of interest (actual or perceived) should not be appointed or remain involved. In many bigger organisations (such as government departments) or agencies with access to investigative units, conflict of interest issues can be resolved effectively by appointing a new investigator/decision maker.

In smaller agencies, and in particular in the non-government sector, this option is not always available. It may not be possible in every case to have an investigator who is totally independent and/or has no prior connection with the person under investigation. Indeed this is not necessary. For example, the relationship of supervisor or work associate may not in itself give rise to a conflict of interest.

However, in all cases where there is, or might be, or might be perceived to be, a conflict of interest, it is important to acknowledge and assess the issues, and deal with them prior to an investigation commencing.

Where it is assessed that the investigator is unable to remain neutral and objective, the investigation must be transferred to someone more independent. Where this is not possible, contact us to discuss how the situation can best be resolved. Your policy should reflect the possibility of this occurring and offer alternative arrangements for dealing with such circumstances.

What can happen if conflict of interest is not dealt with?

A conflict of interest, or the perception of such, in an investigation can have damaging and long-term effects for all concerned. For example: the victim's family is less likely to be satisfied with the outcome, and may seek other redress, such as legal action; the reputation of the agency may suffer; there can be a loss of faith/trust by the community in the agency; and the reputation of the employee may suffer if it is perceived that the reason for a 'not sustained' finding was because of bias.

What we will look for

Were conflict of interest/relationship issues considered:

- When the child abuse allegation was first made (ie between the various people involved)?
- When appointing an investigator?
- During the investigation when collecting information?
- When determining responsibility for decision making? By the adjudicator?
- In any review/appeal procedures/processes?

Assessing conflict of interest

- What is the nature of the conflict? Does the investigator have a personal, financial or other type of relationship with the person(s) against whom the allegation has been made?
- How significant is the relationship/ interest? For example, is the relationship one of simple acquaintance, or that the investigator has worked with the person being investigated, or is the 'conflict' based on something more likely to give rise to personal feelings?
- How serious is the alleged abuse being investigated? The more serious the allegation, the more important it is that there is no actual or perceived conflict of interest. In less 'serious' investigations, or those involving complaints about policies and procedures it is less vital that the investigator has no conflict of interest.
- Would the investigator or anyone associated with them personally benefit from a particular investigation finding?
- How is the conflict of interest likely to impact upon the investigation and outcome?
- How likely is it that the person with the conflict of interest will be, or might appear to be, influenced in their role?
- Does the investigator hold any personal or professional biases which may lead to the conclusion they are not an appropriate person to investigate the matter?
- Does the investigator believe they can remain impartial?
- Has the investigator and/or any person deciding the matter previously demonstrated their ability to deal with situations involving conflict?
- Is the investigator aware of the potential for conflict? Did they volunteer information/acknowledge the conflict?
- What are the views of the alleged victim/family/ complainant? Do they object to the proposed investigator?
- Is it possible to have the roles of investigator and decision maker performed by separate people? (NB: This should be the case wherever possible).
- Is the allegation about the head of the agency? What steps have been taken to address this?

Managing conflict of interest

- What strategies can be employed to minimise any adverse influence? Do these strategies include steps to ensure all relevant facts are collected, the necessary questions/inquiries asked, and a proper investigation carried out?
- Have the details of the perceived or actual conflict of interest/disclosure been fully documented?
- Has the actual or alleged conflict of interest been disclosed to all affected parties and their response obtained?
- Will the investigator undertake, as far as they are able, to perform their duties impartially, and uninfluenced by fear or favour?
- Have decision making responsibilities been passed, as far as is possible, to another person?
- Is it possible to bring in a third party to oversight/ cross-check the investigation?
- Is it possible/acceptable for the head of agency to call on an external investigator or expert to undertake the investigation? This is recommended where the agency determines that it does not have the expertise to satisfactorily conduct all elements of a particular investigation and/or where there is a conflict of interest.
- Can the agency enter into a cooperative arrangement with other agencies so that when an investigator is required, one can be chosen from a 'pool' of investigators from one of the other agencies party to the arrangement.



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Child protection fact sheet No 9



NSW Ombudsman

Risk management following an allegation of child abuse against an employee

This fact sheet is intended to provide an overview of risk management issues in relation to allegations of child abuse against employees. It is not comprehensive and agencies should seek advice when in doubt about any of these issues.

What is risk management in child-related employment?

Risk management means identifying the potential for an incident or accident to occur and taking steps to reduce the likelihood or severity of its occurrence. Employers need to assess the inherent risks in their agency to children* for whom they have responsibility.

All employment situations do not carry the same risks; nor do all employees. Neither will all children have the same vulnerability. Recognising and acknowledging that the risk of child abuse is present in any child-related employment situation is the first critical step towards effective risk management. Child-related agencies should therefore have a risk management plan in place which includes procedures to prevent child abuse occurring in the workplace as well as procedures for responding to incidents or allegations of child abuse against an employee.

* The use of the words child(ren) includes young people.

Initial risk assessment

One of the first steps following an allegation of child abuse against an employee is to conduct a risk assessment. The purpose of undertaking a risk assessment when an allegation is made is to identify and minimise the risks to:

- the child(ren) who are alleged to have been abused by an employee
- the other children with whom the employee may have contact
- the employee against whom an allegation of child abuse has been made
- the employing agency
- the proper investigation of the allegation.

When taking action to address the identified risks, the agency must take into consideration both the needs of the child who is alleged to have been abused and the employee against whom the allegation is made:

Protecting children

The immediate response to an allegation should be one that protects the child or other children from further potential abuse or victimisation. Consideration therefore needs to be given to the following issues:

- Is the child 'at risk of harm'? If so, a report to the Helpline (Department of Community Services) needs to be made and advice received about what action (if any) they intend to take and when, regarding the child and the employee.
- What steps need to be taken to prevent further abuse?
- Where possible the child's daily circumstances should remain unchanged. Exceptions might be where the child is considered to be at risk of victimisation by peers or staff as a result of the allegations or because the alleged abuse has occurred in out of home care, for example, in foster care.

Dealing with employees

Does the agency's child protection policy and code of conduct state that anything should happen to an employee immediately following an allegation of child abuse against them? For example:

- Should the employee remain in their current position, be moved to another area or be suspended?
- If the employee remains in the workplace, what duties should he/she undertake and who will monitor and assess the risk of continued access of the employee to children in the care of the agency. Factors to be considered include:
 - nature and seriousness of the allegation
 - vulnerability of children e.g. age of child, verbal skills, disability etc
 - nature of the position occupied by the employee e.g. level of interaction with children
 - level of supervision of the employee.
- The disciplinary history, safety of the employee and risk to the investigation may also be factors to consider when deciding to leave the employee in position while the investigation is conducted.

Agencies need to include in their child protection policy that a decision to take action on the basis of a risk assessment, following an allegation of child abuse against an employee, has no relevance to the findings of the matter. Until the investigation is completed and a finding made, such action is not to be considered as an indication that the employee did abuse the child(ren). The action taken by the agency is in recognition of the serious potential consequences of the child abuse allegation (whether or not it is proven) and is seeking to manage the risk.

Ongoing risk management

During the investigation period it is important to manage any risks that arise and to review the risk management plan in the light of new information which emerges during this process. It is important that employers also ensure that adequate/necessary support is being provided for:

- the child(ren) who it was alleged had been abused by an employee
- the employee who has had an allegation of child abuse made against him/her
- other relevant parties:
 - this may include parents/carers of the child as well as other children or employees affected by the allegation for example, a witness to the alleged abuse

Risk management at the conclusion of the investigation

At the completion of the investigation a finding is made in relation to the allegation. A review of the investigation should then be conducted to ensure that all relevant 'risk' issues have been considered. This information will provide the employer with an opportunity to put in place measures to minimise any further risk of harm to children in its care. Such measures may include:

- training for one or more employees
- changing work practices in certain situations
- changes to the physical environment
- reviewing the child protection policy.

Other issues to consider

Confidentiality

An agency's child protection policy should highlight the importance of confidentiality following an allegation of child abuse against an employee. It particularly needs to highlight:

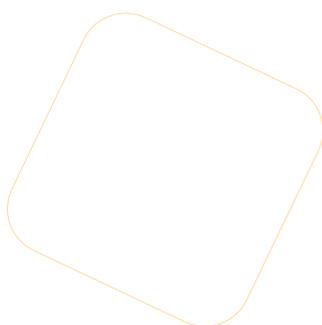
- the importance of all parties maintaining confidentiality during the investigation
- the risk that breaches of confidentiality pose to the investigation process and to the privacy of all parties
- what action will be taken if there is a breach of confidentiality
- that breaches need to be reported to the 'head of agency' and the systems that are in place to deal with such breaches
- how to respond to the media if they become aware of a child abuse allegation against an employee.

Recording information

It is important to record the reasons why you decided to take, or not take any action as a result of your risk assessment and management of the allegation of child abuse against an employee (for more information about recording information please refer to our child protection fact sheet No 2 'Keeping records').

Conflict of interest

A conflict of interest, or the perception of such, if not properly dealt with in an investigation of a child abuse allegation, can compromise that investigation and adversely affect all parties. If potential or actual conflict of interest is identified it is important to develop strategies to address this (for more information about conflict of interest please refer to our child protection fact sheet No 7 'Recognising and managing conflict of interest').



**If you have any queries or comments,
we are here to assist you.
Call our child protection team
on the numbers provided.**

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Annexure H: Investigation case study

Here is a case study involving conduct which requires investigation

You are the corporate services manager, and the Nominated Disclosure Officer, for a government agency and you are responsible for approving major equipment purchases for the agency's four work locations.

Jay, an administrative officer, approaches you in confidence to make a protected disclosure about Rowan, the agency's operations manager.

Jay says Rowan recently favoured a consultant when purchasing technical equipment for the agency. Jay alleges that Rowan wrote the tender specifications so narrowly that only one supplier could meet the agency's needs. The supplier was an engineering consultant who was used regularly by Rowan to provide engineering services and who had recently set up business as an equipment supplier. Rowan chaired the selection panel and recommended that the former consultant's bid be accepted. Jay has recently seen a confidential fax message sent by the consultant to Rowan and suspects Rowan now has a personal interest in the consultant's business.

As the delegate who approved the contract, you are concerned. You are also aware of rumours that Rowan and Jay have had a falling out over a private matter. Jay also has a reputation for bearing grudges against fellow workers.

You think the matter is a protected disclosure and you plan to investigate Jay's allegations in accordance with the agency's internal reporting system.

Drawing up terms of reference and an investigation plan

Before drawing up your terms of reference and investigation plan, you will need to particularise the allegations ie:

Particulars of the allegation:

- That Rowan wrote the tender specifications so narrowly that only one supplier could meet the agency's needs.
- That Rowan has a personal interest in the consultant's business.

An investigation plan

Once drawn up, an investigation plan is not set in stone. As an investigator you should remain flexible and regularly revise the plan in light of any new evidence and/or situations which emerge during the investigation.

Also, remember that your investigation plan should follow the facts, don't make the facts fit into your pre-determined plan.

Your investigation plan for the allegations in the case study should look something like the table over the page.

Investigating complaints

Allegation/ conduct	Issues for inquiry	Benchmarks/Criteria	Proofs/facts in issue	Tasks/avenues of inquiry
Allegation 1: That the tender specifications were narrow	Whether the tender specifications were intentionally drafted narrowly by Rowan for an improper purpose	Breach of in-house or other public sector tendering guidelines (ie maladministration)	That Rowan had a hand in drawing up the specifications That the specifications are unnecessarily narrow That Rowan drew the specifications so narrowly that only the successful tenderer could win the tender	Get the file — this may not tell you who wrote the specifications but you will see the specifications and if necessary, interview other staff to find out who wrote specifications Obtain all relevant tendering guidelines and check for conformity Get an independent expert to look at the specifications to see whether they are too narrow Interview Rowan about his role in developing the specifications
Allegation 2: That Rowan has a personal interest in the successful tenderer	Whether Rowan chaired a selection panel that recommended acceptance of the successful tenderer Whether Rowan has a personal interest in the business of the successful tenderer Whether any direct or indirect benefit was given, provided or offered to Rowan by the successful tenderer	Breach of in-house or other public service tendering guidelines Corrupt conduct, ie partiality as defined in the ICAC Act Criminal conduct – secret commissions	That Rowan has some personal interest in the successful tenderer He is an owner (legally or beneficially) or an associated person such as a spouse or relative is an owner That Rowan has received some benefit, monetary or otherwise from the tenderer	Find out about the successful tenderer and the shareholders – presumably some information is on file (get the fax that Jay referred to), if not you may have to search publicly available company records Review previous contact between agency and tenderer and Rowan and tenderer The successful tenderer was formerly a consultant to the agency – search agency records for information about the consultant, interview other staff Interview relevant staff who might be aware of any benefit that Rowan may have obtained If you can establish the personal connection between Rowan and the successful tenderer, put this to Rowan in an interview, together with all other evidence

Annexure I: Procedures relating to conduct and performance under the Public Sector Employment and Management Act 2002

The *Public Sector Employment and Management Act 2002* (PSEM Act) (at Part 2.7, ss.40 - 53), and procedural guidelines made under that Act, set out the provisions for dealing with:

- unsatisfactory performance
- misconduct
- serious criminal offences.

The statutory provisions relating to conduct and performance commenced on 16 June 2003 and apply to staff in departments, other than chief executives.

The commentary and guidelines on the management of conduct and performance are available in html and PDF formats on the Premier's Department website at www.premiers.nsw.gov.au. They are in Publications under Performance, Conduct and Ethics. The clauses referred to in the tables below, setting out steps for dealing with unsatisfactory performance, misconduct and serious offences, are in the following guidelines:

- Unsatisfactory Performance – Appendix 9-2
- Misconduct – Appendix 9-1
- Serious Criminal Offences – Appendix 9-3

Unsatisfactory performance

The Act and procedural guidelines made under it contain six separate steps for dealing with unsatisfactory performance.

Steps for dealing with unsatisfactory performance

Step 1	Where concerns are raised about performance, management may intervene through informal counselling (cl.7).
Step 2	If performance remains unsatisfactory, then the department head becomes involved and the officer may be formally counselled (cl.8 and s.47(1)).
Step 3	Following formal counselling remedial action may be taken and reviewed (cl.9 and s.47(2)).
Step 4	If performance remains unsatisfactory, consideration can be given to disciplinary action or further remedial action (cl.10 and s.47(2)). If disciplinary action is to be taken, the officer is to be given an opportunity to respond within 14 days.
Step 5	If, after considering the officer's response, the department head decides to take disciplinary action, the officer must be given an opportunity to make a submission within 14 days in relation to the disciplinary action being considered (cl.11 and s.47(4)).
Step 6	Implementation of final decision which may be to take disciplinary action, remedial action or no action (cl.12 and s.47(3)).

In summary:

- The officer concerned must be given a reasonable opportunity to improve his or her performance. If informal counselling is not successful, the department head may decide that the officer should be formally counselled and that other remedial action should be taken such as a performance improvement plan.
- If performance remains unsatisfactory after a reasonable opportunity has been given to the officer to improve, the department head may impose a disciplinary penalty. This is a separate process to that laid down for dealing with misconduct (see below).

Investigating complaints

- The officer concerned is to be given an opportunity to be heard in relation to both the opinion about continuing unsatisfactory performance and, if applicable, any disciplinary penalty being considered.
- After any submissions or representations have been considered, the department head is to decide what final action should be taken ie disciplinary action, remedial action or no action at all.

Misconduct

The Act and procedural guidelines made under it contain eight steps for dealing with misconduct.

Steps for dealing with misconduct

Step 1	Where an allegation of misconduct is made, the department head decides whether to treat the allegation as a disciplinary matter or otherwise (cl.10 and s.46(1)).
Step 2	If it is decided to treat the allegation as a disciplinary matter, a person is appointed to conduct an investigation (cl.11).
Step 3	During the course of the investigation, the officer is given an opportunity to respond to the allegations (cl.11.6.3).
Step 4	The report on the investigation is given to the department head. The report must include the investigator's view on whether the officer has engaged in the alleged conduct (cl.11.11).
Step 5	The department head decides whether, in his/her opinion, the officer has engaged in misconduct (cl.12 and s.45(2)).
Step 6	The department head determines whether to take disciplinary action or otherwise (cl.13).
Step 7	Where the department head decides to take disciplinary action, the officer is advised of that opinion and the disciplinary action being considered, and given an opportunity to make a submission (cl.13.1 and s.46(3)).
Step 8	The department head makes a final decision which may be to take disciplinary action, remedial action or no action (cl.14 and s.46(2)).

In summary:

- Misconduct may relate to an incident or conduct that occurred while an officer was not on duty, or before the officer was appointed to his or her position.
- If an allegation of misconduct is to be treated as a disciplinary matter, a person is to be appointed to conduct a fact-finding investigation. During the investigation, the officer is to be provided with the details of the allegation and given a chance to respond.
- After considering the investigation report, the department head is to decide whether, in his/ her opinion, the officer has engaged in misconduct. If the department head decides to continue down the discipline path, the officer is to be given the opportunity to make a submission and request an interview in relation to the disciplinary penalty being considered and on matters to that stage.
- After any such submission or representations have been considered, the department head is to decide what final action should be taken ie disciplinary, remedial or no action at all.

Serious criminal offences

The Act, the Regulation and procedural guidelines made under the Act contain various steps for dealing with serious criminal offences.

Steps for dealing with serious criminal offences

Step 1	If advice is received of a criminal charge against an officer (cl.100A of the Regulation), confirmation must be obtained as to whether it is a serious offence. If so, the proceedings must be monitored (see matters for consideration in cls.5-7).
Step 2	If the officer is convicted (which includes a guilty finding where no conviction is recorded), the department head is to consider whether to take disciplinary action, remedial action or no action (cls.7-10 and s.48). If the officer is found not guilty, the department head may still decide to deal with the matter as an allegation of misconduct (cl.13).
Step 3	If the department head decides disciplinary action is appropriate, the officer must be notified of that opinion and given an opportunity to make a submission in relation to the disciplinary action being considered (cl.11.2 and s.48(2)).
Step 4	The department head makes a final decision, which may be to take disciplinary action, remedial action or no action (cl.12).

In summary:

- Convictions for a serious offence (ie an offence that may be punishable by 12 months or more imprisonment) include guilty findings where no conviction is recorded.
- Where an officer is convicted of a serious criminal offence, the officer's department head may also impose a disciplinary penalty where the conviction has a direct or relevant connection with the officer's position and duties.
- The officer concerned is to be given an opportunity to be heard before any such disciplinary penalty is imposed.
- After any submissions or representations have been considered, the department head is to decide what action should be taken ie, disciplinary action, remedial action or no action.

Annexure J: Disciplinary procedures in councils

Responsibility for directing and dismissing staff resides with the general manager (*Local Government Act 1993*, s.335). However, the general manager may delegate any of his or her functions to any person or body, including another employee of the council (s.378).

Disciplinary procedures for local government employees are covered by the *Local Government (State) Award 2001*, clause 28. There are no guidelines or procedures to supplement the *Local Government (State) Award 2001* for breaches or discipline by council employees. However, specific council based awards currently apply to Sydney, South Sydney, Newcastle and Wollongong Councils and the County of Yancawinna and these awards include disciplinary procedures which apply in those councils.

Under the *Local Government (State) Award 2001*, where an employee's work performance or conduct is considered unsatisfactory the employee must be informed by his or her immediate supervisor, or other appropriate officer of the council, of the nature of the unsatisfactory performance or conduct and of the required standard to be achieved. If there is reoccurrence of unsatisfactory work performance or conduct, the employee must be warned formally in writing by the appropriate officer of council and counselled. If the employee's unsatisfactory work performance continues or resumes following the formal warning and counselling, the employee must be given a final warning in writing giving notice of disciplinary action should the unsatisfactory work performance or conduct not cease immediately.

Disciplinary action can include warnings, demotions, suspension without pay for a period of time or termination.

At all times during the disciplinary process an employee:

- has access to his or her personal files and may take notes and/or obtain copies of the contents of the file
- is entitled to sight, note and respond to any information placed on his or her personal file which might be regarded as adverse
- is entitled to make application to delete or amend any disciplinary or other record mentioned on his or her personal file which he or she believes is incorrect, out-of-date, incomplete or misleading
- is entitled to request the presence of a union representative or the involvement of his or her union at any stage
- is entitled to make application for accrued leave for whole or part of any suspension during the investigation process.

A council's rights during the disciplinary process are:

- to suspend an employee with or without pay during the investigation, provided that the conditions specified in the *Local Government (State) Award 2001* are satisfied
- to take other disciplinary action before or during disciplinary procedures, in cases of misconduct or where the employee's performance warrants such action
- in appropriate circumstances, to terminate an employee's services
- to request the presence of a union representative at any stage.

A council has a corresponding obligation to properly conduct and speedily conclude an investigation into the alleged unsatisfactory work performance or conduct.

The Industrial Commission of NSW and the Australian Industrial Relations Commission have the right to interpose themselves upon application and review any disciplinary action of a council against an employee. Both tribunals apply the principles of procedural fairness in determining whether they will intervene in any disciplinary matter.

However, procedural fairness is only one of several factors that may be considered. In determining a claim, NSW Industrial Tribunals will consider:

'...whether a reason for the dismissal was given, ... if any such reason was given ... its nature, whether it had a basis in fact, and whether the applicant was given an opportunity to make out a defence or give an explanation for his or her behaviour or to justify his or her reinstatement or re-employment, and ... such other matters as the Commission considers relevant.' (*Industrial Relations Act 1996*, Chapter 2 Part 6)

In some cases, such as summary dismissal for misconduct (or serious and wilful misconduct), the facts of the dismissal will overcome any procedural deficiencies.

Senior staff whose position requires the performance of engineering duties (as defined) are covered by a specific federal award, the *Local Government Engineers Senior Staff (NSW) Award 1999*. Senior staff who meet this definition have access to the unfair dismissal provisions of the federal *Workplace Relations Act*.

The general manager and other 'senior staff' nominated as such under s.332 of the *Local Government Act* are employed under performance-based contracts. The *Local Government Act* makes it clear that the employment of the general manager or other nominated senior staff on any matter, question, or dispute relating to any such employment is not an industrial matter for the purposes of the *Industrial Relations Act 1996*. Termination of such contracts can be with or without notice, depending on the circumstances and on the provisions of the contract. Although disciplinary procedures in relation to senior staff are a contractual matter, a council must still follow the principles of procedural fairness.

Other positions of a senior nature but not nominated as 'senior staff' under the Act by the Council are also covered by the provisions of the Award, even if employed on the basis of a contract.

Annexure K: Essential elements of a discipline scheme

Essential elements of a discipline scheme

In many circumstances a risk management approach will be the preferred approach for dealing with allegations of misconduct. For those circumstances in which it is felt that a disciplinary system is appropriate or necessary, care should be taken to ensure it incorporates the following elements.

Authorisation

Provisions for the authorisation of persons to be responsible for:

- instituting disciplinary action
- carrying out disciplinary inquiries/investigations, and
- imposing any appropriate penalty.

Powers

Provision of necessary powers to conduct a disciplinary inquiry/investigation, within the scope of the legal powers available to the agency itself. For example the authority to ask staff members to attend an interview and to answer questions, and the authority to access relevant records.

Breaches of discipline

A list of the types of conduct that may result in the institution of disciplinary action, eg:

- contravention of the enabling legislation or charter for the agency
- engaging in any misconduct
- breaching provisions of a code of conduct
- consuming or using alcohol or drugs to excess
- intentionally disobeying or intentionally disregarding any lawful orders made or given by a person having authority to do so
- negligence, carelessness, inefficiency or incompetence in the discharge of duties
- engaging in disgraceful or improper conduct
- taking detrimental action against a whistleblower, or
- conviction for a serious offence.

Charges/notifications

Procedures for notifying the individual that disciplinary action has been instituted arising out of an alleged breach of discipline.

Suspension

Provisions for the suspension of employees the subject of disciplinary action during the course of such action where it is inappropriate for the person to remain at work during the investigation.

Natural justice/procedural fairness

Procedures for ensuring that persons the subject of disciplinary action are given procedural fairness, eg:

- giving the person an opportunity to make written representations or oral representations on the matter(s) the subject of a disciplinary inquiry/ investigation
- allowing the person to be represented by another if it appears that the person is not able to speak effectively on his or her own behalf
- giving the person an opportunity to comment on the substance of any adverse comment proposed to be made, and
- giving the person a copy of the final report if any adverse finding is made and/or detrimental action proposed.

Confidentiality

Prohibiting those responsible for implementing disciplinary action from disclosing confidential information obtained during the disciplinary action except for the purpose of the action or any proceedings arising from it.

Reports

Provisions requiring the production of reports by those responsible for a disciplinary inquiry/ investigation which set out:

- at least brief facts on which the person who conducted the inquiry/ investigation relies in reaching the conclusions set out in the report
- conclusions, and
- recommendations for further action.

Punishments and management action

A list of the types of penalties that can be imposed on or management action taken in relation to employees by the agency.

Annexure L: Interviewing children – some basic guidelines

Proviso

Interviewing children is a highly complicated subject and, when done properly, is a discipline all in itself. An investigator, or a person performing an investigative role, may be proficient at interviewing adults and obtaining information, but may be unable to glean even basic material from a child. In fact, it is far harder to effectively interview a child than it is an adult.

It takes in-depth specialised training and many years of professional experience in order to become an expert at interviewing children.

The following precis is only a guide to assist people who find themselves having to interview a child for whatever situational reason.

Investigators who are not trained properly to interview children should only do so:

- as a last resort, or
- if there is some urgency in obtaining information from a child, or
- if the agency concerned is responsible for investigating the allegation (ie it is not a matter that can be or has been referred to the police or the Department of Community Services for investigation, or these agencies have declined to act on the matter) and no better trained or experienced person is available.

The material in this guide is primarily aimed at interviewing children who have been subjected to some form of abuse. However, the underlying principles relating to how to interview children hold true regardless of the context.

If investigators can find a qualified and experienced person to interview the child in question, they should do so.

Sources: The Interpol Standing Working Party on Offences against Minors and The NSW Department of Community Services

The 'do' and 'don't' checklist

Do:

- learn the relevant background first
- respect the rights of the child
- build a rapport with the child first
- brief the child on the purpose of the interview
- understand the developmental stage of the child
- talk to the child in appropriate language
- ask simple and clear questions
- limit the number of people present during the interview
- allow the child a support person where appropriate
- thank the child at the end of the interview
- interview a child when information is urgently needed
- minimise distractions and interruptions.

Don't:

- ask leading questions
- touch the child
- intimidate the child
- make the child feel bad about what they're disclosing
- ask more than one question at a time
- interview a child on more occasions than is absolutely necessary
- interview a child when someone more qualified is available to do so.

Introduction

Interviewing a child is one of the most difficult interviews that an investigator will undertake. It is important that, whenever possible, only trained and experienced investigators interview children. The principal bodies responsible for the investigation of allegations of abuse against children in NSW are the police and the Department of Community Services (DoCS). There are occasions however, particularly in disciplinary matters, where an investigator, or a person performing an investigative role, may have to interview a child. It is for those occasions that this guide has been prepared.

It is also possible that a person investigating a disciplinary matter will find themselves having to obtain information from a child after other authorities, such as the police or DoCS, have interviewed the child. This may be where an investigation by such an authority has been concluded with no criminal or welfare action being taken, but disciplinary enquiries still need to be attended to. In such cases it is highly preferable that an investigator tries to obtain copies of the child's interview with the other investigative authority and to glean the required information from those sources, rather than seeking to interview the child again and possibly cause further trauma. Such other investigative bodies will usually release a copy of a child's interview to the child's parents or guardians.

If in doubt about whether or not to interview a child, seek the advice of an investigative body such as the NSW Police Service Child Protection Squad (CPS) or a Community Services Centre of DoCS.

Remember that where an interview reveals some form of child abuse, ensure that DoCS and the police are notified. An interview that reveals serious child abuse should be terminated as soon as practicable and a qualified person brought in to continue obtaining information.

There are no easy guidelines for investigators on how to conduct an interview with a child. Ideally, interviewers should be trained and experienced in interviewing children. This guide is not exhaustive and is only intended to provide a broad overview of some of the principles involved in interviewing children.

Part 1: Preparing for the interview

Investigators should be clear about the purpose of the interview and should make themselves familiar with the fundamental interviewing stages outlined elsewhere in this chapter. Ideally, they should have a good understanding of the issues surrounding interviewing children. Particular attention should be placed on the items listed below.

Contingency plans

From the outset an investigator should have predetermined plans to deal with possible contingencies that may arise. When interviewing children, this is particularly relevant in respect to an interview becoming something other than it first appears. For instance, where an interview appears initially to involve only relatively minor physical abuse of the child, but then there is a sudden disclosure of serious sexual abuse. The interviewer should be in a position to be able to deal immediately with the change in circumstances.

Developmental stages of children

It is obviously important for the investigator who wishes to obtain information from a child to take into account the different stages of childhood and to select the style of interview, interviewer, and method of recording, most appropriate to the chronological and developmental age of the child. To assist in this determination Attachment A contains a list of some indicators of the developmental stages of children and how they relate to questioning.

Ability of children to recall events and convey information

Depending on their physical and intellectual capacity, children may not be able to convey recollections, inner feelings and thoughts satisfactorily in a verbal manner. The type of questions asked and the ability of the interviewer will assist the child to give their account of what happened.

Children's names for parts of their bodies, and particularly the genitalia, are often very private, idiosyncratic and ambiguous. For example, the child may use the word 'bottom' to describe all the area between the legs. It must also be remembered that a child's concepts of in/out, up/down, front/back, on top/underneath, on/off etc. should not be taken for granted and must be clarified.

Aids to the interview

With younger children the trained interviewer may wish to provide drawing materials, telephones, a doll's house including furniture and occupants, a few cars, soft toys or puppets to help children express their feelings and memories of what happened to them. It is important to note, however, that it is recommended that the use of such aids be undertaken only by properly trained and experienced investigators.

Concentration span

Children have a much shorter concentration span than adults. This is important with regard to the length of interviews. Frequent breaks may assist some children.

The importance of interviews as a source of information

Since many alleged incidents, especially in the field of sexual assault, have no impartial witnesses and leave no traces, the main method of investigation will be by way of interview. In the majority of cases the first and foremost reason for children to be interviewed will be to establish what happened (who, how, when, what, where, why).

The right of children not to make a statement

A child, like an adult, has the right to opinions and understanding of circumstances and events. Children have the same rights as adults with regard to making a statement and either they, or their parent or guardian on their behalf, may refuse to participate in an interview.

Background briefing

As with adults each child is an individual person, with a personality that has been formed by environment, social standing and upbringing. Before interviewing a child it is important for investigators to find out as much information as possible regarding:

- the child's state of mind
- the child's physical condition
- the child's age and developmental stage
- the child's communication skills
- any learning difficulties
- medical and social history

- sexual understanding and vocabulary used
- the child's first language and the possible need for an interpreter or the selection of an interviewer speaking the language
- any hearing or speaking difficulties which may require the presence of a person skilled in the sign language used by the child or picture cards developed for interviewing children with a developmental handicap.

Rapport building

The interviewer must develop a good rapport with the child. The more comfortable a child feels with the interviewer, the more likely that child is to disclose details of the alleged incident. Where the child is not comfortable, he or she becomes reticent and the interviewer runs the risk of not obtaining important information.

Rapport building can be done while talking with the child about favourite subjects, playing with the child or indeed, rapport building can be incorporated into the body of the interview. This is done while the interviewer obtains information on the child's understanding of pronouns and prepositions, concepts, and discusses truth and lies. Whatever way the interviewer chooses to build rapport, it should be done in a planned way and with the result that the child feels comfortable with talking to the interviewer.

Briefing children

It is extremely important that the nature of the interview is discussed with the child before the interview. The roles of the people present in the interview should be discussed. Children should be made aware that they have done nothing wrong (unless inappropriate), that they have nothing to fear about the interview and that they will be treated fairly.

Venue and facilities

It is important for investigators to locate appropriate neutral and child-friendly premises that can be used for interviewing children. These premises may be located in police, hospital, education or social service buildings for example. The child should not be interviewed in the place where the allegation was said to have taken place. Ideally, special child interview suites greatly assist the child in making him or her comfortable and at ease with the interview process. Where special premises are not available it is important that the interview is conducted in appropriate neutral surroundings, with few or no distractions, where there will not be disturbance from traffic noise, telephones ringing and people entering the room.

Recording facilities and equipment

Ideally, depending on the purpose and duration of an interview, video recordings of correctly conducted interviews can be of considerable value. They provide a clear record of the child's own account, showing his or her demeanour at the time of the interview. They can be particularly useful with younger children where the interview may have included the use of dolls, toys or drawings to explain the nature of the incident. For this reason video recording is preferable to audio tape recording.

Where video facilities are not available, the interview with the child should be recorded at the time of the interview. The record of the interview should accurately reflect the exact words used by both the interviewer and the child. Paraphrasing of a child's statement is not sufficient as interviewers run the risk of placing their own interpretation on the words used.

The interviewer

Worldwide there are many variations about who conducts interviews of children the subject of allegations. One common point however, is that whoever the interviewer may be, that person must be trained and experienced in the interviewing of children. In matters where the child is to be interviewed by agency officials of the same agency as the accused person, great care should be taken to ensure there are no conflicts of interests.

The lead interviewer

If it is decided that two interviewers are to be used it is important that, during the pre-interview rapport building session with the child, they evaluate which of them will be best suited to lead the questioning in the subsequent interview.

The conduct of the interviewer

Interviewers of children must consider their own role carefully. Children tend to react strongly to the atmosphere around them during an interview session. Throughout interview sessions interviewers must maintain a professionally neutral distance from their own feelings and never show children that they are angry or feel sorry for them.

Persons to be present at the interview – the accompanying adult

In order not to intimidate and distract the child it is important to limit the number of people present. However, especially with small children, it is recommended that a supportive adult is also present to comfort and reassure the child. Ideally this would be the child's parent or close family member. Particular care should be taken with respect to cultural issues when deciding who should be present.

The supporting adult will need some briefing from the investigating team regarding the nature of the interview and their precise role. This will enable them to explain the purpose and method of the interview to the child. The interviewer will also need to explain that the supporting adult will not be permitted to question the child during the interview.

The supportive adult present during the interview should accompany the child to and from the interview premises. Interviewers should never touch the children, not even with a comforting pat on the head or shoulder. Such reassurance should be left to the chosen accompanying adult. This adult should be someone whom the child knows and trusts.

It should be noted that in some situations it could be inappropriate for the accompanying adult to be one of the child's parents or guardians. Such situations could be where a parent or guardian is alleged to have, or is suspected of having, abused the child or there are reasons, such as adolescence, that would inhibit the child from talking openly in front of a parent.

It must be further stressed that it is also inappropriate, where one parent or guardian is suspected of abuse against the child, to have the other parent or guardian present as the accompanying adult. This is because the child is likely to be unduly influenced by the presence of an adult who is inherently connected to the alleged abuser.

It must also be highlighted that in certain circumstances a child has a legal right to have an independent adult present during questioning. This is particularly applicable where the child themselves is suspected of a possibly criminal matter.

Part 2: The interview

The structure of the interview

The purpose of the interview is to discover what happened. The interviewer must approach the interview with an open mind. The quality of the interview will depend largely on the skills of the interviewer. It is important for the interviewer to listen.

Conducting an interview with a child is demanding and requires careful preparation. An interviewer will usually prepare a plan for the interview. A suggested outline plan for an interview is:

- an introductory phase
- rapport building
- concepts
- raising the allegation
- collecting detail
- finishing.

In the introductory phase, investigators should review the reasons for the interview and remind the child of the importance of being honest in his/her explanations. They should also explain to the child that he/she has the right not to talk to them, and also to say 'I don't know,' 'I don't remember,' or 'I don't understand.'

The interviewer should explore the issues surrounding the child's understanding of truth and lies. The child must agree to tell the truth. If the child cannot differentiate between truth and lies, the information he or she is able to supply may still be useful in ensuring the safety of the child. The fact that the difference is not understood does not preclude such a child from being interviewed.

Concepts raise such issues as colours, numbers, pronouns and prepositions, understanding of the truth and lies, make believe and promises.

Listening to children

With children it is important to be patient and not to interrupt, even if they seem to take long pauses. It is vital to let children proceed in their own way, at their own pace and by using their own phrases.

It is common for children to 'test out' the interviewer by initially only relating certain information which may in fact have nothing to do with what the child wants to disclose, and will disclose, when they are comfortable with the interviewing adult. It is entirely possible, therefore, for an interview to begin as totally innocuous, and remain that way for some time, and then suddenly involve the most serious of disclosures, once the child is at ease to talk. Sometimes this may also be a manifestation of avoidance of disclosure by the child.

Interviewers must attempt to listen in a different way and try to put themselves in the child's situation and pursue the child's way of thinking.

The style of questioning to be used

The interviewer must take care with the formulation of questions. Those beginning with 'why?' can contribute to children's feelings of guilt or shame, and indeed the child may not know the reason why.

A question should not be repeated straight away as the child may feel that this is a criticism of their previous answer. It may be useful to repeat the answer the child gave in order to reinforce the fact that what was said was understood.

Investigating complaints

If a question is repeated several times this will often lead to children giving an answer contrary to their immediate conception, changing the answer to what they think the interviewer wishes to hear.

A child should never be asked more than one question at a time. The interviewer should ensure that the questions are simple and do not involve confusing forms of language.

Once an interviewer starts questioning a child, careful consideration will need to be given on how to do so without the use of leading questions (ie questions where the child is offered no alternative but to answer 'yes', 'no', or which suggest an answer).

Bearing in mind that the purpose of the interview is to find out what happened, direct and sometimes leading questions may have to be asked. The interviewer should weigh up the interests of the child's safety against the use of the interview in a court or similar tribunal.

A guide to leading questions, their use and abuse and suggestions for change are included at Attachment B.

If possible interviewers should leave any use of direct questions to the end of the interview. If a child seems unwilling to answer, or seems forgetful, the interviewer may try to get the child to talk using a more open question such as:

*'Are there some things that you don't like to talk about?' or
'Are there some things that you would rather talk about?'*

rather than asking questions such as 'Tell me about...'

Once again it is important for the interviewer not to interrupt children when they are relating something even if it does not make immediate sense, or seems to be a repetition of something already mentioned. Children should be allowed to finish their explanations, then the interviewer can seek clarification by reflections, using the same words that the child used.

Establishing dates and times

When the interview has reached a point where it is necessary to ask for more details regarding a given explanation, eg the date of a certain event, it may be productive to relate to events which have more relevance for children, than to relate to actual dates and named days of the week. Often children have no concept of time as such whereas highlights such as Christmas, birthdays, school holidays, outings and other breaks in the daily routine will be more likely to be remembered. Likewise with times of the day, incidents may be better remembered as before or after meal times, television programs, school or bedtime.

Explanations

With other issues, such as where the interviewer cannot understand what a child is explaining, or where a child cannot understand the interviewer's question, it may prove fruitful for the interviewer to ask the child to make a drawing or to demonstrate by way of pointing.

It is not always possible for a child to put his or her thoughts into words.

Part 3: Terminating the interview

When interviewers decide to terminate an interview they should:

- leave sufficient time to check with children that they have correctly understood anything which has been explained
- review what the child has said
- explore child's expectations of interview outcome
- anticipate retraction pressures
- answer any questions the child may have
- explain what will happen next
- arrange next contact with child and give them your name and telephone number
- thank the child
- help the child re-enter the day-to-day world.

Interviewers should not let children leave an interview feeling that they have failed or not been believed.

It is important to ask children if there is anything more that they wish to say, or if there are any questions which they wish to ask the interviewer. Interviewers must remember to thank children for their time and effort.

Attachment A

Developmental stages – Interviewing children

To ensure a successful interview the interviewer must plan and prepare for the interview, and use child-centred interviewing techniques such as responding to the child's needs and avoiding interrogation of the child. When conducting interviews with children the interviewer needs to take account of, and direct their approach to:

- the child's level of comprehension and language skills
- the developmental level or stage the child is at currently, and
- the child's background, gender and any special needs.

The primary purpose of the interview will be to discover the 'what, who, where, and when' of events. The following gives an indication of what can generally be expected when interviewing children of different ages. These are only a guide and can be affected by a wide range of other factors such as the level of the child's distress and the amount of support provided to the child.

'What'

Developmental age	Notes to interviewer
2-3	<ul style="list-style-type: none"> • ask the same questions several times to ensure consistency • expect child to answer with 1-3 word sentences • children do not know colours
4-5	<ul style="list-style-type: none"> • expect multi-word sentences • children know colours
6 and over	<ul style="list-style-type: none"> • can answer open-ended questions and provide a lot of descriptive detail

'Who'

Developmental age	Notes to interviewer
2-3	<ul style="list-style-type: none"> • ask the same questions several times to ensure consistency • very unlikely a child will confuse a close person with another person
4 and over	<ul style="list-style-type: none"> • can consistently and reliably identify significant persons

'Where'

Developmental age	Notes to interviewer
2-3	<ul style="list-style-type: none"> • child can give almost no detail about location
4-5	<ul style="list-style-type: none"> • child will usually only give incomplete answers • may be able to describe the local environment • cannot identify places by address
6-8	<ul style="list-style-type: none"> • child can identify place by good local description, possibly by street
Over 8	<ul style="list-style-type: none"> • child can identify by address

'When'

Developmental age	Notes to interviewer
2-3	<ul style="list-style-type: none"> • child can give no answers • all answers are usually unreliable
4-5	<ul style="list-style-type: none"> • child can give some more descriptive information eg it was dark outside
6-8	<ul style="list-style-type: none"> • child can give some more expanded descriptive information but not a full description eg 'I was on holidays'
Over 8	<ul style="list-style-type: none"> • child can give more exact information eg it was the day before my birthday • by age 10-12 years child may be able to give dates

Attachment B

Leading questions

Leading questions may:

- usually be answered with a yes or no
- contain an answer, or a choice of answers
- name an accused person
- specify the alleged misconduct, and
- link the suspected offender and the offence before the child has given these details in the interview.

Leading questions are a problem because they can:

- confuse a child
- suggest an answer which may not be true, or as the child remembers it, and
- reduce or destroy the reliability or weight of a child's evidence.

To avoid using leading (or suggestive) questions, it is important:

- not to assume that there has been any misconduct/wrongdoing (even in the most suspicious circumstances there may be an innocent explanation)
- not to assume that the identity of the accused person is known (it may be someone else)
- not to presume what happened is already fully known (it may not be), and
- that the interviewer's tone, manner or phrasing do not suggest that a particular answer is wanted or expected, or that the child will be praised for telling (or not telling).

The following examples should help explain the concepts.

Questions must not suggest an answer, or choice of answers

Leading questions	Non-leading questions
Did it happen at school?	Where did it happen?
Did he tell you not to tell?	What did he say? Did he say anything?
Were you scared, angry or sad?	How were you feeling when...?
Were you in the classroom or the corridor?	Where were you?

Questions must not name the person who is the subject of the complaint (accused person) before the child has identified them?

Leading questions	Non-leading questions
When did Mrs B. touch you there? (when the child has not yet said Mrs B. did anything).	What happened?
We've been told you are having a problem with Mr D.	Are you have having any problems? (If yes) Who are you having problems with?
Where was the table in the room?	What was in the room? How were things placed?

Questions must not assume unproven facts or knowledge/details of the alleged misconduct or offence.

Leading questions	Non-leading questions
Which hand did he hurt you with?	How did he hurt you?

Investigating complaints

Questions must not contain the interviewer's assumptions.

Leading questions	Non-leading questions
We are going to ask you some questions about what happened to you.	We are going to ask some questions.
Where was the table in the room?	What was in the room? How were things placed?

Leading questions should only be used when the questions relate to matters not in dispute, such as a child's name and address or to repeat details the child has already given in the interview, eg:

Child: Mr X touched me.

Interviewer: Where did Mr X touch you?

Child: In the toilets.

Interviewer: Which part of your body did Mr X touch?

Suggestive statements

Suggestive statements, like leading questions, are extremely problematic. Some examples of the types of comments to avoid include:

Suggestive statements	Non-suggestive statements
We've talked to children about these things before ...there's no need to feel ashamed.	Tell us how things are going for you.
If you tell me about it I'll be able to stop it happening.	It's important to know what happened.
It's good that you remembered.	Perhaps briefly paraphrase what has been said to ensure your understanding is accurate.

Generally, avoid leading or suggestive questions and statements unless there is no alternative.

The primary purpose of an interview is to discover the 'what', 'where', 'who', 'why', 'how' and 'when' of events. The majority of questions should therefore begin with these types of words. In addition, an interview will generally lead to some decision-making about what happens next. If children are asked leading questions, their evidence may be compromised, and any subsequent decisions made may be potentially flawed and open to criticism.

The best way of ensuring a child is able to give an account of events in their own words is to promote 'free narrative' from the child. Open-ended, non-leading questions enable children to provide more information without pressure. More specific, yet non-leading questions can be used to extend and clarify information. Remember that child-centred interviewing meets the child's needs, focuses on listening, and does not make suggestions or impose the interviewer's views on the child.

Attachment C

Below are a few contact points in NSW for further information and/or training in relation to interviewing children:

- Department of Community Services
- Child Protection Squad (NSW Police)
- Commission for Children and Young People
- Charles Sturt University, Wagga campus, Child Protection Investigation course
- Child psychologists
- Private consultants (often advertised in Public Service notices and the media)

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All topics are indexed under specific subjects with see references for alternative headings.

See *also* references have been included to guide the reader to related subjects

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