



## Making a finding

At the conclusion of an agency's investigation of a reportable allegation under Part 3A of the *Ombudsman Act 1974*, the head of agency should assess the evidence regarding the allegation(s) and make a finding in relation to each allegation. The finding should inform an agency's final risk assessment and any action taken to mitigate ongoing risks, including reporting any relevant employment proceeding to the Commission for Children and Young People (CCYP).

The investigator should present all the evidence to the head of agency, including all of the information gathered that supports or refutes the allegation. The investigator may then make a recommendation, based on this information, about the outcome of the investigation.

The civil standard of proof, 'the balance of probabilities', applies to agency investigations of allegations against employees. This means that the agency need only be satisfied that it is more likely than not that the allegation is true in order to sustain an allegation. However, the amount of evidence required to get to this stage varies. The more serious the likely consequences for the employee if the allegation is proven, the greater the weight of evidence that is required. This is known as the 'Briginshaw' principle. Under this principle, where an employee is likely to receive a caution if the allegation is sustained then it might be reasonable for the investigator to choose to take one person's unsupported word against another where this appears to be justified. Where the allegation is so serious that the employee may potentially be dismissed, there would need to be more evidence of the employee's wrongdoing to enable the decision-maker to be reasonably satisfied that the allegation was sustained.

Where there is reasonable justification to dismiss an employee on the basis of the finding of an investigation, any agency that is considering such action must also ensure that the correct employment procedures for the dismissal of employees are followed.

The head of agency must assess the strength or weight of the evidence, when making a finding. However, the strict rules of evidence that apply in court do not apply to agency investigations of reportable allegations. There are some general considerations that can assist in determining how much weight to place on information and to determine a finding. These considerations are not independent from one another, so evidence that satisfies one consideration may very well also satisfy others. Further information about rules of evidence and weighing evidence can be found in section 5.19.2 (pages 93–95) of NSW Ombudsman guidelines – *Child Protection in the Workplace: Responding to allegations against employees*.

### Available findings

For the purposes of the Ombudsman Act, a finding in an agency investigation of a reportable allegation may be that the allegation is:

- sustained (ie a finding that the conduct occurred), or
- not sustained – insufficient evidence (ie there is some evidence of weight however there is insufficient evidence available to reasonably establish that the alleged conduct did occur), or
- not sustained – lack of evidence of weight (ie where the evidence is of such poor probative value or lacking in weight, such as to warrant a finding that, on the balance of probabilities, the conduct did not occur), or
- false (ie where inquiries into the matter show reportable conduct or an act of violence did not occur). Some of these matters may be vexatious, for example where inquiries into the matter show the allegation was made without substance and to cause distress to the person against whom the allegation was made, or

- not reportable conduct (ie where inquiries into the matter show the conduct was not reportable). For example, use of force that was trivial or negligible in the circumstances, conduct that was reasonable in the circumstances or accidental.

This may include ‘misconceived’ matters, where inquiries into the matter show that, even though the allegation was made in good faith, it was based on a misunderstanding of what actually occurred and the incident was not reportable conduct.

Matters of a class or kind exempted from being reportable conduct under s.25CA of the Ombudsman Act (ie matters that fall within a Class or Kind Determination are examples of reportable conduct that are exempted from notification to the Ombudsman).

## Notification to the CCYP

Agencies, like all employers covered by the CCYP’s jurisdiction, are required by s.39 of the CCYP Act to notify CCYP of all completed relevant employment proceedings in which reportable conduct has been found to have occurred (a ‘sustained’ finding) or there is some evidence that reportable conduct occurred (a ‘not sustained – insufficient evidence’ finding).

The table below indicates the available findings for purposes of the Ombudsman Act, and provides a guide about whether reporting to the CCYP is required.

Finding	When to use	CCYP Reporting
‘sustained’	There is sufficient evidence that the reportable conduct occurred.	Yes
‘not sustained – insufficient evidence’	There is some evidence that reportable conduct occurred, however there is not enough evidence to make a conclusive finding.	Yes
‘not sustained – lack of evidence of weight’	A reportable allegation has been made however there is no evidence of weight that the reportable conduct occurred.	No
‘false’	There is clear evidence to show that the alleged conduct did not occur.	No
‘not reportable conduct’	Inquiries show that the conduct was not reportable conduct.	No

For matters that fall within a Class or Kind Determination with the Ombudsman, consult the CCYP to determine whether CCYP reporting is required.

Level 24, 580 George Street  
Sydney NSW 2000

If you wish to visit us, we prefer you make an appointment. Please call us first to ensure your complaint is within our jurisdiction and our staff are available to see you.



This fact sheet is one of a series produced by the NSW Ombudsman. Feedback is welcome.

Our business hours are:  
Monday to Friday, 9am–5pm  
(Inquiries section closes at 4pm)

Telephone Interpreter Service (TIS): 131 450  
We can arrange an interpreter through TIS or you can contact TIS yourself before speaking to us.

General inquiries: 02 9286 1000

Toll free (outside Sydney metro): 1800 451 524

Tel. typewriter (TTY): 02 9264 8050

Facsimile: 02 9283 2911

Email: [nswombo@ombo.nsw.gov.au](mailto:nswombo@ombo.nsw.gov.au)

Web: [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)